

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1906

No. 290

**JAMES STEWART & COMPANY, PLAINTIFF IN
ERROR,**

vs.

DOMINICK RIVARA

**IN THE UNITED STATES SUPREME COURT OF THE STATE OF NEW
YORK**

APRIL TERM, 1906

(SL.370)



(31,678)

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1926

No. 290

JAMES STEWART & COMPANY, PLAINTIFF IN
ERROR,

v.s.

DOMINICK RIVARA

IN ERROR TO THE SUPREME COURT OF THE STATE OF NEW
YORK

INDEX

	Original	Print
Record on appeal to court of appeals of New York.....	<i>a</i>	1
Judgment of affirmance.....	<i>a</i>	1
Statement under rule 234.....	1	2
Record from supreme court of New York.....	2	3
Notices of appeal.....	2	3
Bill of complaint.....	4	4
Exhibits—Agreement between James Stewart & Co. and Dominick Rivara, April 17, 1919.....	9	8
Extracts from personal property law of New York	12	10
List of payments made.....	14	11
Memorandum opinion, James Stewart & Co. vs. The Tug "James B. Stewart".....	15	12
Answer of James Stewart & Company.....	17	13
Exhibit—Statement of account.....	29	20
Answer of James Stewart & Co., Inc.....	34	23
Exhibit—Statement of account.....	45	31
Reply to answer of James Stewart & Co.....	50	34

INDEX

	Original	Print
Reply to answer of James Stewart & Co., Inc.....	60	40
Findings of fact and conclusions of law.....	70	47
Plaintiff's exceptions to findings of fact.....	77	51
Defendant James Stewart & Company's exceptions to findings of fact.....	79	52
Minute entries.....	82	53
Judgment	83	54
Case and exceptions.....	85	55
Appearances of counsel.....	85	55
Colloquy between court and counsel.....	85	55
Testimony of William Rohde.....	94	61
Colloquy between court and counsel.....	96	63
Defendant's Exhibit A—Agreed statement of facts..	98	64
Affidavit of no opinion.....	104	68
Stipulation settling case.....	105	69
Order settling case.....	105	69
Stipulation waiving certification.....	106	69
Order to file transcript of record.....	106	70
Notice of appeal to court of appeals.....	107	70
Order allowing appeal, appellate division.....	109	71
Order of affirmance, appellate division.....	111	72
Order of resettlement of the order of affirmance.....	113	72
Judgment of affirmance.....	114	73
Opinion	116	74
Stipulation waiving certification.....	117	74
Supplemental record on appeal to court of appeals.....	119	75
Statement under rule 234.....	119	75
Record from supreme court of New York.....	122	76
Notice of appeal to court of appeals.....	122	76
Order allowing appeal, appellate division.....	124	77
Stipulation as to trials and printing, court of appeals..	126	78
Stipulation waiving certification.....	127	78
Clerk's certificate.....(omitted in printing)...	128	
Order on remittitur.....	129	79
Judgment	132	80
Petition for writ of error.....	134	82
Reporter's certificate.....(omitted in printing)...	142	
Judge's certificate to clerk and reporter (omitted in print- ing)	142	
Opinion, Cardozo, J.....	143	86
Assignments of error.....	147	91
Order allowing writ of error.....	151	94
Writ of error.....	153	95
Citation and service.....(omitted in printing)...	155	
Bond on writ of error.....(omitted in printing)...	156	
Stipulation re transcript of record.....	159	97
Clerk's certificate, supreme court....(omitted in printing)...	162	
Statement of points to be relied upon and designation by plaintiff in error of parts of the record to be printed, with proof of service.....	163	99

[fol. a]

IN COURT OF APPEALS OF NEW YORK

Remittitur November 25, 1925

DOMINICK RIVARA, Plaintiff-Appellant,
against

JAMES STEWART & COMPANY, Defendant-Appellant

JUDGMENT OF AFFIRMANCE—November 24, 1925

Be it remembered that on the 1st day of August in the year of our Lord one thousand nine hundred and twenty-five, James Stewart & Company, the defendant-appellant in this cause, came here unto the Court of Appeals, by Kirlin, Woolsey, Campbell, Hickox & Keating, its attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the Second Judicial Department, which return was thereafter amended and Dominic Rivara, the plaintiff-appellant in said cause, afterwards appeared in said Court of Appeals by Macklin, Brown & Van Wyck, his attorney and also filed a notice of appeal.

Which said Notices of Appeal and the return thereto, filed and amended as aforesaid, are hereunto annexed.

[fols. b-d] Whereupon the said Court of Appeals having heard this cause argued by Mr. Harrington Putnam and Mr. John M. Woolsey, of counsel for the defendant appellant, and by Mr. James M. Gorman, of counsel for the plaintiff-appellant and after due deliberation had thereon did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed without costs.

And it was further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court there to be proceeded upon according to law.

Therefore it is considered that the said judgment be affirmed without costs, as aforesaid.

And hereupon, as well as the Notices of Appeal and the return thereto aforesaid as the judgment of the Court of

Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted to the Supreme Court of the State of New York, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court before the Justices thereof, &c.

(Sgd.) Wm. J. Armstrong, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office

Albany, November 25, 1925.

I hereby certify that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(Sgd.) Wm. J. Armstrong, Clerk. (Seal of Court.)

[fol. 1] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

STATEMENT UNDER RULE 234

This case comes up for review pursuant to an order made by this Court, dated June 15th, 1925, granting defendants leave to appeal from the judgment and order of affirmance by the Appellate Division, Second Department as well as from the re-settled order of affirmance which denied costs. Notice of appeal was served July 15th, 1925.

This action was commenced by the voluntary appearance of the defendants on January 13, 1922.

The answers of the defendants were served on March 21, 1922, and the plaintiff's replies thereto on April 14, 1922. The defendant, James Stewart & Co., Inc., amended its answer at the trial.

Plaintiff appeared by Macklin, Brown, Purdy & Van Wyk, its attorneys, and the defendants by their attorneys, Kirlin, Woolsey, Campbell, Hickox & Keating.

There have not been any changes of parties or attorneys.

[fol. 2] IN SUPREME COURT OF NEW YORK

DOMINICK RIVARA, Plaintiff,
against

JAMES STEWART & COMPANY and JAMES STEWART & COMPANY,
Inc., Defendants

DEFENDANT'S NOTICE OF APPEAL—Filed March 12, 1925

SIRS: Please take notice that the defendant, James Stewart & Company, hereby appeals to the Appellate Division of the Supreme Court for the Second Department, from the judgment entered in the office of the Clerk of the County of Queens on March 6, 1925, which adjudged that the plaintiff, Dominick Rivara, recover from the defendant, James Stewart & Co., the sum of \$8,989.01, and from each and every part of said judgment as well as the whole thereof.

Dated New York, March 9, 1925.

Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for Defendants.

Office and P. O. Address: 27 William Street, Borough of Manhattan, City of New York.

To Macklin, Brown, Purdy & Van Wyck, attorneys for plaintiff, 44 Beaver Street, N. Y. C.; Edward W. Cox, County clerk of Queens County.

[File endorsement omitted.]

[fol. 3] IN SUPREME COURT OF NEW YORK

[Title omitted]

PLAINTIFF'S NOTICE OF APPEAL—Filed March 13, 1925

SIRS: Please take notice that the plaintiff in the above entitled action, Dominick Rivara, hereby appeals upon questions of law and upon the facts to the Second Department from so much of the judgment of the Supreme Court, Queens County, entered in this action in the office of the

Clerk of the County of Queens, on the 6th day of March, 1925, in favor of the plaintiff and against the defendant, James Stewart & Company in the sum of \$8,989.01 as limits the amount for which judgment is granted to plaintiff to the sum of \$8,989.01 and plaintiff appeals from said part of said judgment alone and from no other part thereof.

Dated New York, N. Y., March 10, 1925.

Yours, etc., Macklin, Brown, Purdy & Van Wyk, Attorney for Plaintiff.

Office & P. O. address: 44 Beaver Street, Borough of Manhattan, City of New York.

To Kirlin, Woolsey, Campbell, Hickox & Keating, attorneys for defendant, 27 William Street, New York City; Edward W. Cox, Esq., Clerk of the Court, Queens County.

[File endorsement omitted.]

[fol. 4] IN SUPREME COURT OF NEW YORK

[Title omitted]

BILL OF COMPLAINT

The plaintiff for his complaint herein alleges as follows:

First. That at all the times hereinafter mentioned the plaintiff was, and still is a resident of the County of Queens, in the City and State of New York.

Second. On information and belief that at all the times hereinafter mentioned the defendant, James Stewart & Company, was, and still is a Foreign Corporation, organized and existing under and by virtue of the laws of the State of New Jersey, and engaged in doing business in the State of New York, and having an office for the regular transaction of business in the City of New York.

Third. On information and belief that at all the times hereinafter mentioned the defendant James Stewart & [fol. 5] Company, Inc., was and still is a Domestic Corporation, organized and existing under and by virtue of the Laws of the State of New York.

Fourth. That on or about the 17th day of April, 1919, the plaintiff and the defendants in the City of New York, entered into an agreement, a copy of which is annexed and marked Schedule "A," and hereby made a part hereof as if herein set forth at length and in detail.

Fifth. That by operation of law the Personal Property Law of the State of New York relating to conditional sales was irrevocably written into said agreement and formed a part thereof, and its contents were agreed to by plaintiff and defendants.

Sixth. That among other things the said Personal Property Law provides as set forth in Schedule "B" hereto annexed and hereby made a part hereof as if herein set forth at length and in detail.

Seventh. That pursuance of the said contract the defendants delivered the said tug James B. Stewart to the plaintiff on or about the 17th day of April, 1919, and the said tug remained in the possession of the plaintiff from that time up to the time she was retaken by the defendants from the plaintiff as hereinafter set forth.

Eighth. That in performance of said contract, plaintiff made the payments in defendants set out in Schedule "C" [fol. 6] hereto annexed and hereby made a part hereof as if herein set forth at length and in detail, and such payments were so made at the times named in the said contract.

Ninth. That subsequent to October 27th, 1920, plaintiff defaulted in his payments of One Thousand (\$1,000) Dollars a month as required by said agreement.

Tenth. That plaintiff prior to April 7th, 1921, defaulted in the payments required to be made by him under the said agreement.

Eleventh. That on or about April 7th, 1921, defendants without plaintiff's permission retook the said tug from plaintiff's possession, and on information and belief still retain the same.

Twelfth. That on or about the 19th day of March, 1921, and while the said tug was still in the plaintiff's possession a libel was filed by James Stewart & Company, one of the defendants herein, in the United States District Court, for

the Southern District of New York against the said tug, in a cause of possession, and after trial of the issues raised in the said action, the Trial Court handed down an Opinion, a copy of which is attached hereto marked Schedule "D" and made a part hereof as if herein set forth at length.

Thirteenth. That thereupon and on or about April 7th, 1921, a final decree was entered in the said action in the United States District Court, Southern District of New [fol. 7] York, adjudging that James Stewart & Company, the Libellant in that action, one of the defendants herein was entitled to the immediate possession of the said steam-tug, and directing the U. S. Marshal to deliver the said tug to James Stewart & Company forthwith.

Fourteenth. On information and belief that on or about the 7th day of April, 1921, the U. S. Marshal did deliver in pursuance of the said decree the possession of the said tug to the defendants.

Fifteenth. That within thirty (30) days after the delivery of said tug to the defendants as aforesaid, the plaintiff did not redeem the said tug nor comply with the terms of the said agreement, nor did the plaintiff make good his default and plaintiff did not receive back the said tug.

Sixteenth. On information and belief that after the expiration of the said thirty (30) days, neither the defendants nor either of them, nor their successors in interest if any, sold the said tug at public auction.

Seventeenth. On information and belief that after the delivery of the said tug to the defendants by the U. S. Marshal as aforesaid, neither the defendants nor either of them nor their successor in interest if any, sold the said tug in accordance with the provisions of the Personal Property Law of the State of New York.

Eighteenth. On information and belief that said tug was [fol. 8] not sold within thirty (30) days after the expiration of the period of thirty (30) days above named, during which plaintiff did not comply with the terms of the said agreement, nor has the said tug been sold at any time at public auction since the time she was delivered to the defendant by said Marshal.

Nineteenth. That the defendants did not give notice required by Section No. 66 of the said Personal Property Law set out in said Schedule "B" annexed hereto.

Twentieth. That the defendants did not give any notice to plaintiff of the sail of the said steamtug at public auction or otherwise after delivery of the said tug to the defendant by the U. S. Marshal as aforesaid.

Twenty-first. That on plaintiff's failure to redeem by complying with the contract within thirty (30) days after the tug was redelivered to the defendants by the U. S. Marshal as aforesaid, and defendants' failure to sell the said tug on due notice within the period of thirty (30) days as aforesaid pursuant to said Statute, the plaintiff is entitled to recover of the defendants the several sums with interest from the various dates set forth in said Schedule "C" pursuant to Section 65 of the aforesaid Personal Property Law of the State of New York relating to conditional sales.

Twenty-second. That by reason of the premises there is due and owing from defendants to plaintiff the several sums of money with interest from the named dates as appear in Schedule "C" hereof and the aggregate of the same.

[fol. 9] Twenty-third. The plaintiff has duly demanded of plaintiff payment of the same, but payment has been refused.

Wherefore plaintiff demands judgment against the defendants for the several sums of money set out in Schedule "C" hereof with interest thereon from their respective dates, and the aggregate of all of said sums, amounting to Twenty-three Thousand Five Hundred and Eighteen and 87/100 (\$23,118.87) Dollars, besides interest thereon together with the costs of this action.

Macklin, Brown, Purdy & Van Wyk, Attorneys for Plaintiff.

Office & P. O. address: 44 Beaver Street, Borough of Manhattan, City of New York.

EXHIBIT TO BILL OF COMPLAINT

SCHEDULE "A"

This agreement, made at the City of New York on the 17th day of April, 1919, between James Stewart & Company, Inc., hereinafter referred to as the Party of the First Part, and Dominick Rivara, of Rockaway Beach, New York, hereinafter referred to as the Party of the Second Part:

Whereas the said party of the first part is desirous of selling a certain tug named "James B. Stewart" now lying at the foot of 79th Street and North River, New York City, for the price of \$32,500.00 and the party of the second [fol. 10] part being desirous of purchasing the said tug at said price, and

Whereas said party of the second part has paid to the party of the first part, the sum of \$5,500.00 receipt of which is hereby acknowledged, and it is mutually understood that the said tug is to be taken in its present condition:

Now therefore, it is agreed between the parties hereto, in consideration of the mutual promises herein contained:

1. That title to the said tug is not to pass until final payment has been made of the said \$32,500.00 as above mentioned. The balance of \$27,000.00 is to be paid in installments as hereinafter mentioned, with interest computed thereon at the rate of 6% per annum from date hereof. A payment is to be made at the office of the party of the first part, No. 30 Church Street, New York City, on or before the 15th day of May, 1919, of \$5,000.00. The balance of \$22,000.00 is to be paid by monthly installments of \$1,000.00 per month, to be paid on or before the 15th day of each month at No. 30 Church Street, until the entire purchase price has been paid. In case of default, by the party of the second part, or any of the payments, or a violation of any of the terms and conditions of this agreement, herein mentioned, the said party of the first part shall have the right to re-enter and take possession of the said tug wherever she may be situated and in that event, any and

all payments previously made, shall be deemed to be, and shall be applied solely as rental, and in case of said re-entering and taking possession by the party of the first [fol. 11] part, the said party of the second part waives any and all claims that he has or had, in or to the said tug.

2. It is further understood and agreed, that should the party of the second part decide to make full and complete payment of the total purchase price within six months from the date hereof, the said party of the first part will reduce the purchase price of the said tug by \$2,500.00 making, in that event, the purchase price \$30,000.00 with interest at 6% from date of this agreement. Should the party of the second part not exercise the option of full payment within six months, purchase price is to remain as heretofore mentioned, viz., \$32,500.00.

3. The party of the second part agrees to keep the said tug at all times in first class repair and first class condition, to the satisfaction of the party of the first part, and to supply and furnish competent pilot and crew as required by law, and to navigate and use said tug only within the present limits or official routing that said tug now has. The party of the second part hereby agrees to keep the said tug free from any and all libels, of any kind whatsoever, pending the fulfillment of all the terms of this agreement, and the party of the second part further agrees that the said party of the first part will place insurance on said tug for the value of the boat against fire, marine, accident, liability, compensation, loss and towers liability, and any and all other forms of insurance that the party of the first part may deem necessary for its protection; the premiums of which are to be paid by the party of the second part as follows:

[fol. 12] As agreed between the Second Party and T. F. Spellane.

4. The said party of the second part hereby agrees to indemnify and save harmless, the said party of the first part, from any and all claims arising out of the operation and control of said tug by the party of the second part, of every sort, nature and description.

5. The said party of the second part further agrees to furnish satisfactory security to the extent of \$10,000 within seven days from date hereof to the party of the first part for the faithful performance and the carrying out of all the terms of this agreement, by the party of the second part.

In witness whereof the parties hereto have set their hands and seals this day and year first above written.

James Steward & Co., Inc., by W. A. Rowan, Treas.
Dominick Rivara.

Witness:- H. F. Barnes, Thorndyke Cille Kennee.

EXHIBIT TO BILL OF COMPLAINT

Schedule "B"

Sec. 65. Sale of property retaken by vendor. Whenever articles are sold upon the condition that the title thereto shall remain in the vendor, or in some other person [fol. 13] than the vendee, until the payment of the purchase price, or until the occurrence of a future event or contingency, and the same are retaken by the vendor, or his successor in interest, they shall be retained for a period of thirty days from the time of such retaking, and during such period the vendee or his successor in interest, may comply with the terms of such contract, and thereupon receive such property. After the expiration of such period, if such terms are not complied with, the vendor, or his successor in interest, may cause such article to be sold at public auction. Unless such articles are so sold within thirty days after the expiration of such period, the vendee, or his successor in interest may recover of the vendor the amount paid on such articles by such vendee or his successor in interest under the contract for the conditional sale thereof.

Sec. 66. Notice of Sale.—Not less than fifteen days before such sale, a printed or written notice shall be served personally upon the vendee, or his successor in interest, if he is within the county where the sale is to be held; and if

not within such county, or he cannot be found therein, such notice must be mailed to him at his last known place of residence.

Such notice shall state

1. The terms of the contract.
 2. The amount unpaid thereon.
 3. The amount of expenses of storage.
 4. The time and place of the sale, unless such amounts are sooner paid.
-

[fol. 14] EXHIBIT TO BILL OF COMPLAINT

Schedule "C"—Payments Made

1919.

April 17	\$5,500.00
May 15	5,126.00
June 16	1,134.29
July 15	1,129.29
Aug. 19	124.29
Dec. 15	500.00

1920.

Jan. 15	500.00
Feb. 17	200.00
Mar. 23	1,000.00
Apr. 16	1,000.00
May 17	1,200.00
June 18	1,100.00
July 15	1,200.00
Aug. 16	1,000.00
Sept. 14	1,005.00
Oct. 16	1,000.00
Oct. 27	800.00
	<hr/>
	\$23,518.87

[fol. 15]

EXHIBIT TO BILL OF COMPLAINT**Schedule "D"****UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK****April (1921) Term****JAMES STEWART & COMPANY, Libellant,
against****THE TUG "JAMES B. STEWART," Respondent****Before Hon. Augustus N. Hand, District Judge****Final Hearing****Charles R. Hickox, Esq., for libellant.
William P. Purdy, Esq., for respondent.****MEMORANDUM OPINION**

The COURT (orally): I can see no lack of jurisdiction in a Court of Admiralty to award possession of a vessel merely because such a decision involves consideration of a contract of conditional sale. I look at that contract as I would at any testimony or any other fact that might become apparent in the course of a trial to see whether the libellant has title to the vessel, and if so whether any arrangement has been made by the libellant with the claimant which might interfere with the former's obtaining possession.

The examination of libellant's witnesses clearly shows that default has been made in payment of the amount due under the contract of conditional sale. This is not disputed by claimant. It therefore is perfectly evident that the libellant is entitled to possession of the tug in suit. Libellant, [fol. 16] of course, will take that possession subject to any rights or accountability which he may be under by reason of the provision of the Sales Act of the State of New York or any other law. My decision is limited to the awarding of the mere possession, which according to my understanding is likewise all that is sought in the libel.

Rights of the libellant and claimant other than the possessory rights, which I am adjudicating, are not involved in this case, and furthermore, as no testimony has been offered covering the same, I am making no decision with respect to them.

Augustus N. Hand, United States District Judge.
April 7, 1921.

Duly sworn to by Dominick Rivara. Jurat omitted in printing.

[fol. 17] IN SUPREME COURT OF NEW YORK

[Title omitted]

ANSWER (JAMES STEWART & COMPANY)—Filed March 6, 1925

The defendant, James Stewart & Company, by its attorneys, Kirlin, Woolsey, Campbell, Hickox & Keating, answering the complaint herein, alleges on information and belief as follows:

First. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the first paragraph of the complaint.

Second. It admits that James Stewart & Company was and it still is a corporation organized and existing under and pursuant to the laws of the State of New Jersey. It denies the other matters alleged in the second paragraph of the complaint.

Third. It admits the matters alleged in the third paragraph of the complaint.

Fourth. It admits the matters alleged in the fourth paragraph of the complaint.

[fol. 18] Fifth. It denies the matters alleged in the fifth paragraph of the complaint.

Sixth. It admits the matters alleged in the sixth paragraph of the complaint.

Seventh. It admits that its agent James Stewart & Company, Inc., delivered the tug "James B. Stewart" to the plain-

tiff on or about April 17, 1919, and that the tug remained in the possession of and was operated by the plaintiff for his own use and benefit from that time until the United States Marshal was ordered to deliver the said tug to this defendant, James Stewart & Company, as hereinafter set forth. It denies the other matters alleged in the seventh paragraph of the complaint.

Eighth. It admits that the plaintiff made certain payments to James Stewart & Company, Inc., as set out in Schedule C of the complaint at the times mentioned in the said schedule, but denies the other matters alleged in the eighth paragraph of the complaint.

Ninth. It admits the matters alleged in the ninth paragraph of the complaint, but alleges that prior to October 27, 1920, the plaintiff was in default under the said agreement.

Tenth. It admits the matters alleged in the tenth paragraph of the complaint.

Eleventh. It denies the matters alleged in the eleventh paragraph of the complaint.

[fol. 19] Twelfth. It admits the matters alleged in the twelfth paragraph of the complaint

Thirteenth. It admits the matters alleged in the thirteenth paragraph of the complaint.

Fourteenth. It admits the matters alleged in the fourteenth paragraph of the complaint.

Fifteenth. It admits the matters alleged in the fifteenth paragraph of the complaint.

Sixteenth. It admits the matters alleged in the sixteenth paragraph of the complaint.

Seventeenth. It admits that after the tug James B. Stewart was delivered to James Stewart & Company, the tug was not and has not been sold, but it denies that the Personal Property Law of the State of New York required the defendants or either of them to sell the said tug.

Eighteenth. It admits the matters alleged in the eighteenth paragraph of the complaint.

Nineteenth. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the nineteenth paragraph of the complaint.

Twentieth. It admits the matters alleged in the twentieth paragraph of the complaint.

Twenty-first. It denies the matters alleged in the twenty-first paragraph of the complaint.

[fol. 20] Twenty-second. It denies the matters alleged in the twenty-second paragraph of the complaint.

Twenty-third. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the twenty-third paragraph of the complaint.

As a first separate and distinct defense, this defendant, realleging the allegations hereinabove set forth, alleges, on information and belief as follows:

Twenty-fourth. On or about April 17, 1919, the defendant, James Stewart & Company, Inc., as agent for and in behalf of this defendant, James Stewart & Company, entered into a contract with the plaintiff, a copy of which is annexed to the complaint herein, marked Schedule A. The said agreement contains a clause and condition which gave this defendant the right in case of default by the plaintiff, of any of the payments, or the violation of any of the terms and conditions of the agreement, to re-enter and take possession of the tug James B. Stewart wherever she might be situated; and in that event, any and all payments previously made by the plaintiff were deemed to be, and were to be applied solely as rental; and in case this defendant should re-enter and take possession of the said tug the plaintiff agreed to waive any and all claims that he has or had in and to the said tug.

By reason of the aforesaid provisions of the said agreement [fol. 21] and because the subject matter of the contract was a vessel, to wit, a steamtug duly enrolled in the Custom House in the Southern District of New York, the personal property law of the State of New York relating to conditional sales does not apply in any respect to the aforesaid agreement and form a part thereof, but on the contrary, was excluded in its application to the said agree-

ment. This defendant accordingly is not under any obligation to return any part of the payments made by the plaintiff under the said agreement, but on the contrary is entitled to retain such payments and any further sums paid by the plaintiff to this defendant as rental for the said tug during the time that the tug was in the possession of and operated by the plaintiff.

As a second separate and distinct defense and a set off and a counterclaim, this defendant, realleging the allegations hereinabove set forth, alleges as follows:

Twenty-fifth. Before the commencement of this action, and from April 17, 1919, to April 7, 1921, the said tug James B. Stewart was in the possession of and operated by the plaintiff, for his own use and benefit. If the plaintiff is entitled to any recovery in this action, which this defendant denies, this defendant is entitled to set off against such recovery the amount of the reasonable rental for the use of the said tug during the aforesaid period, which, so nearly as it can now be estimated, amounts to the sum of \$23,666.66, and the further sum of \$14,010.22 for disbursements and ad-[fol. 22] vances made by the defendant, James Stewart & Company, Inc., as agent for this defendant, for the repair, upkeep and insurance of the said tug during the aforesaid period at the request of and for the account of the plaintiff, which the plaintiff agreed to pay to the defendant, James Stewart & Company, Inc., or a total sum of \$37,676.88.

As a third separate and distinct defense and as a counter-claim in favor of this defendant against the plaintiff, this defendant further alleges, on information and belief, as follows:

Twenty-sixth. At all the times hereinafter mentioned the plaintiff was and it still is a resident of the County of Queens, State of New York.

Twenty-seventh. At all the times hereinafter mentioned the defendant James Stewart & Company, Inc., was and it still is a corporation duly organized and existing under and pursuant to the laws of the State of New York, with an office for the transaction of business at 30 Church Street, New York City, and the duly authorized agent of this defendant, James Stewart & Company.

Twenty-eighth. At all the times hereinafter mentioned James Stewart & Company was and it still is a corporation duly organized and existing under and pursuant to the laws of the State of New York.

Twenty-ninth. At all the times hereinafter mentioned James Stewart & Company was and still is the owner of the [fol. 23] steamtug James B. Stewart, and the said tug has been and still is enrolled in the Custom House in the Southern District of New York under the name of James Stewart & Company, as owner.

Thirtieth. On or about April 17, 1919, at New York, the defendant James Stewart & Company, Inc., as agent, and for the benefit of the defendant, James Stewart & Company, which was not disclosed, contracted with Dominick Rivara, of Rockaway Beach, New York, by an agreement in writing, in which James Stewart & Company, Inc., was described as the Party of the First Part, and Dominick Rivara as the Party of the Second Part, to sell to the said Rivara the tug James B. Stewart, under certain terms and conditions, which provided that the said Rivara should operate the tug and make various payments, but that title to the tug should not pass until complete payments had been made by Rivara of the purchase price. It was also provided in the said contract that the said Rivara should make payment by monthly installments of one thousand (\$1,000) dollars per month on or before the fifteenth day of each month, until the entire purchase price should have been paid.

The said agreement annexed to the complaint herein as Schedule A contained among others the following provisions:

"In case of default by the Party of the Second Part of any of the payments or a violation of any of the terms and conditions of this agreement herein mentioned, the said Party of the First Part shall have the right to re-enter and [fol. 24] take possession of the said tug wherever she may be situated, and in that event any and all payments previously made shall be deemed to be, and shall be, applied solely as rental, and in case of said re-entering and taking possession by the Party of the First Part the said Party of the

Second Part waives any and all claims that he has or had in or to the said tug."

"3. The Party of the Second Part agrees to keep the said tug at all times in first class repair and first class condition to the satisfaction of the Party of the First Part * * * The Party of the Second Part further agrees that the said Party of the First Part will place insurance on the said tug for the full value of the boat * * * the premiums of which are to be paid by the Party of the Second Part * * *."

Thirty-first. The purchase that the plaintiff agreed to pay for the tug was \$32,500. The plaintiff also agreed to pay for the premiums of insurance on the said tug and to indemnify and save harmless the defendant, James Stewart & Company, Inc., from any and all claims arising out of the operation or control of the said tug by the plaintiff, of every sort, nature or description.

Thirty-second. Thereafter Dominick Rivara made certain payments on account to the defendant, James Stewart & Company, Inc., as agent for this defendant, under the said agreement of April 17, 1919, but did not make any payments in full after May 15, 1919, and the said Dominick [fol. 25] Rivara therefore was in default under the said agreement from May 15, 1919.

Thirty-third. A statement of account was prepared by the defendant, James Stewart & Company, Inc., as of January 25, 1921, showing that on that date there was due, owing and payable by Rivara to James Stewart & Company, Inc., as agent for this defendant, the sum of \$24,078.85 under the agreement of April 17, 1919. A copy of this statement is annexed hereto, marked Schedule A, and made a part of this answer and counterclaim. Dominick Rivara has admitted at various times that this statement is correct and that the balance of \$24,078.85 is due from him to the defendant, James Stewart & Company, Inc., and that he has not made any payments on account thereof.

From January 25, 1921, to April 7, 1921, interest accrued on the said sum of \$24,079.85 amounting to \$288.95.

In violation of his obligations under the said agreement the plaintiff did not pay for various supplies and material

ordered by him for the said tug, but among other sums admittedly due by him, improperly and wrongfully neglected and refused to pay the sum of \$179.84 properly and reasonably due from the plaintiff to Burns Brothers, coal dealers, for coal supplied to the said tug James B. Stewart, and ordered by the plaintiff prior to April 7, 1921. By reason of the premises the said tug was subject to a lien in favor of Burns Brothers, for the sum of \$179.84. In order to free the said tug from the said lien it became necessary for this defendant to pay, and it did pay, to Burns Brothers, [fol. 26] before the commencement of this action, the sum of \$179.84.

Subsequently and before the commencement of this action this defendant was required to pay, and it did pay, certain additional sums for the supplies, repairs and insurance on the said tug, which the plaintiff under the terms of the said agreement was obligated to pay, amounting to the sum of \$1,256.51.

The total of these sums amounts to \$25,804.15.

Thirty-fourth. Dominick Rivara admitted on March 3, 1921, and at various times, that he was in default under the said agreement, and that he was obligated to return the said tug to the defendant, James Stewart & Company, Inc., but he declined to return the said tug to the said defendant unless the said defendant would give to Rivara a general release of all claims against Rivara under the said contract of April 17, 1919.

Thirty-fifth. The failure on the part of the said Dominick Rivara to make payments as provided in the contract of April 17, 1919, and the refusal of the said Rivara to return the said tug to the defendant, James Stewart & Company, Inc., as agent for this defendant, was wrongful and improper. By reason thereof this defendant, James Stewart & Company, became entitled to immediate possession of the said tug and on March 19, 1921, a libel was filed in the United States District Court for the Southern District of New York, against the said tug by James Stewart & Company, in a cause of possession, and on April 7, 1921, after a trial in which Dominick Rivara appeared personally [fol. 27] and was represented by counsel a final decree was signed by Judge A. N. Hand, that the libellant was entitled

to the immediate possession of the said tug and the marshal was directed to deliver the said tug to James Stewart & Company.

Thirty-sixth. By reason of the premises this defendant, James Stewart & Company has suffered damages and has become entitled to recover from the plaintiff the sum of \$15,804.15, with interest thereon.

Thirty-seventh. Payment of the said sum of \$15,804.15 has been duly demanded by this defendant from the plaintiff but has been refused and no part thereof has been paid, and the said sum still remains wholly due, unpaid, and owing from the plaintiff to this defendant.

Thirty-eighth. The defendants have duly performed all the obligations resting on them under the above mentioned agreement.

Wherefore, this defendant, James Stewart & Company, demands judgment that the complaint of the plaintiff be dismissed with costs and that it have a judgment against the plaintiff for the sum of \$15,804.15, with interest thereon from the 7th day of April, 1921, together with costs and disbursements of this action.

Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for Defendant, James Stewart & Company.

Office & Post Office address: 27 William Street, Borough of Manhattan, City of New York.

[fol. 28] *Duly sworn to by L. V. Heuser. Jurat omitted in printing.*

[fol. 29] EXHIBIT TO ANSWER JAMES STEWART & COMPANY

Statement of account showing purchase price and amount remaining unpaid as of Jan. 25th, 1921, under agreement between James Stewart & Company, Inc., and Dominick Rivara for purchase of tug "James B. Stewart," dated April 17, 1919.

1919.

April 17. Purchase price of Tug James B. Stewart	\$32,500.00
April 17. For coil of 8" rope furnished	377.42

May	15.	Interest on balance of \$27,000.00 from April 17 to May 15—28 days	126 00
May	27.	Paid Deposit premium on Work- men's Compens. Ins. Policy year end. Apr. 17/20	218 70
June	15.	Interest on balance of \$22,377.42 from May 16 to June 15, 31 days	115 62
June	15.	Interest on balance of \$218.70 from May 27 to June 15, 19 days	69
July	15.	Interest on balance of \$21,578.12 from June 16 to July 15, 30 days	107 89
Aug.	15.	Paid Marine Ins. Premium for 1 year ending April 17, 1920	4,262 75
Aug.	15.	Interest on balance of \$24,819.47 from July 16 to August 14, 31 days	128 23
[fol. 30]			
Sept.	15.	Interest on balance of \$24,823.47 from August 16 to Sept. 15, 31 days	128 25
Oct.	15.	Interest on balance of \$24,951.66 from Sept. 16 to Oct. 15, 30 days	124 76
Nov.	15.	Interest on balance of \$25,076.42 from Oct. 16 to Nov. 15, 31 days	129 56
Dec.	15.	Interest on balance of \$25,205.98 from Nov. 16 to December 15, 30 days	126 03
1920.			
Jan.	15.	Interest on balance of \$24,832.01 from Dec. 16 to Jan. 15, 31 days	128 30
Feb.	15.	Interest on balance of \$24,460.31 from Jan. 16 to Feb. 15, 31 days	126 38
Mar.	15.	Interest on balance of \$24,386.69 from Feb. 16 to Mar 15, 29 days	117 87
Apr.	15.	Interest on balance of \$23,504.56 from Mar. 16 to Apr. 15, 31 days	121 44
May	15.	Interest on balance of \$22,626.00 from Apr. 16 to May 15, 30 days	113 13
May	17.	Paid Deposit premium on Work- men's Compens. Ins. Policy year end. Apr. 17/21	150 60
[fol. 31]			

1920.

June	9.	Paid Marine Ins. Premium for 1 year ending April 17, 1921.....	3,840.63
June	15.	Interest on balance of \$21,539.13 from May 16 to June 15, 31 days.....	111.28
June	15.	Interest on balance of \$150.60 from May 17 to June 15, 29 days.....	.73
June	15.	Interest on balance of \$3,840.63 from June 9 to June 15, 6 days.....	3.84
July	15.	Interest on balance of \$876.46 from July 3 to July 15, 13 days.....	1.90
July	2.	Paid bill covering cost of making repairs to tug	876.46
July	2.	Paid Kingsford Foundry & Mach. Works for set of boiler grates ..	164.16
July	15.	Interest on balance of \$24,546.21 from June 16 to July 15, 30 days.....	122.73
July	15.	Interest on balance of \$164.16 from July 2 to July 15, 13 days.....	.36
Aug.	15.	Interest on balance of \$24,511.82 from July 16 to Aug. 15, 30 days.....	126.64
Sept.	17.	Interest on balance of \$23,638.46 [fol. 32] from Aug. 15 to Sept. 15, 31 days.....	122.13
Oct.	15.	Interest on balance of \$22,755.59 from Sept. 16 to Oct. 15, 30 days.....	113.78
Oct.	1.	Bill of Knickerbocker Brokerage Co. Ins. Marine Ins. Premium ..	548.77
Oct.	27.	Bill of Merritt & Chapman Derrick & Wrecking Co. for services in connection with raising tug	1,125.00
Nov.	15.	Interest on balance of \$21,869.37 from Oct. 16 to Oct. 27, 12 days.....	43.74
Nov.	15.	Interest on balance of \$21,069.37 from Oct. 27 to Nov. 15, 19 days.....	66.72
Dec.	15.	Interest on balance of \$21,179.83 from Nov. 16 to Dec. 15, 30 days.....	105.89
 1921.			
Jan.	15.	Interest on balance of \$21,285.72 from Dec. 16 to Jan. 15, 31 days.....	109.98
Jan.	19.	Bill of Knickerbocker Brokerage Co. Ins. Marine Ins. Premium ..	1,009.38
			\$47,597.72

[fol. 33] Less Payments Made

1919.

April 17	.....	\$5,500.00
May 15	.....	5,126.00
June 16	.....	1,134.29
July 15	.....	1,129.29
Aug. 19	.....	124.29
Dec. 15	.....	500.00

1920.

Jan. 15	.....	500.00
Feb. 17	.....	200.00
Mar. 23	.....	1,000.00
Apr. 16	.....	1,000.00
May 17	.....	1,200.00
June 18	.....	1,100.00
July 15	.....	1,200.00
Aug. 16	.....	1,000.00
Sept. 14	.....	1,005.00
Oct. 16	.....	1,000.00
Oct. 27	.....	800.00

\$23,815.87

Balance due James Stewart & Company, Inc.

\$24,078.85

E. & O. E.

Prompt payment of all amounts due to date is hereby demanded.

Jan. 25, 1921.

[File endorsement omitted.]

[fo. 34] IN SUPREME COURT OF NEW YORK

[Title omitted]

ANSWER (JAMES STEWART & COMPANY, INC.)—Filed March 6, 1925

The defendant, James Stewart & Company, Inc., by its attorneys, Kirlin, Woolsey, Campbell, Hickox & Keating, answering the complaint herein alleges on information and belief as follows:

First. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the first paragraph of the complaint.

Second. It admits that James Stewart & Company was and it still is a corporation organized and existing under and pursuant to the laws of the State of New Jersey. It denies the other matters alleged in the second paragraph of the complaint.

Third. It admits the matters alleged in the third paragraph of the complaint.

Fourth. It admits that on April 17, 1919, the plaintiff and James Stewart & Company, Inc., as agent and for the [fol. 35] benefit of the defendant, James Stewart & Company, entered into an agreement at New York City, a copy of which is marked Schedule "A" and annexed to the complaint herein. It denies the other matters alleged in the fourth paragraph of the complaint.

Fifth. It denies the matters alleged in the fifth paragraph of the complaint.

Sixth. It admits the matters alleged in the sixth paragraph of the complaint.

Seventh. It admits that it delivered the tug James B. Stewart to the plaintiff on or about April 17, 1919, and that the tug remained in the possession of and was operated by the plaintiff for his own use and benefit from that time until the United States Marshal was ordered to deliver the said tug to James Stewart & Company as hereinafter set forth. It denies the other matters alleged in the seventh paragraph of the complaint.

Eighth. It admits that the plaintiff made certain payments to this defendant, James Stewart & Company, Inc., as set out in Schedule "C" of the complaint at the times mentioned in the said Schedule, but denies the other matters alleged in the eighth paragraph of the complaint.

Ninth. It admits the matters alleged in the ninth paragraph of the complaint, but alleges that prior to October 27, 1920, the plaintiff was in default in his payments to this defendant under the said agreement.

Tenth. It admits the matters alleged in the tenth paragraph of the complaint.

[fol. 36] Eleventh. It denies the matters alleged in the eleventh paragraph of the complaint.

Twelfth. It admits the matters alleged in the twelfth paragraph of the complaint.

Thirteenth. It admits the matters alleged in the thirteenth paragraph of the complaint.

Fourteenth. It admits the matters alleged in the fourteenth paragraph of the complaint.

Fifteenth. It admits the matters alleged in the fifteenth paragraph of the complaint.

Sixteenth. It admits the matters alleged in the sixteenth paragraph of the complaint.

Seventeenth. It admits that after the tug James B. Stewart was delivered to James Stewart & Company the tug was not and has not been sold, but it denies that the Personal Property Law of the State of New York required the defendants or either of them to sell the said tug.

Eighteenth. It admits the matters alleged in the eighteenth paragraph of the complaint.

Nineteenth. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the nineteenth paragraph of the complaint.

Twentieth. It admits the matters alleged in the twentieth paragraph of the complaint.

Twenty-first. It denies the matters alleged in the twenty-first paragraph of the complaint.

[fol. 37] Twenty-second. It denies the matters alleged in the twenty-second paragraph of the complaint.

Twenty-third. It denies that it has any knowledge or information sufficient to form a belief as to the matters alleged in the twenty-third paragraph of the complaint.

As a first separate and distinct defense, this defendant, realleging the allegations hereinabove set forth, alleges, on information and belief, as follows:

Twenty-fourth. The agreement entered into between the plaintiff and this defendant on April 17, 1919, being Schedule "A" annexed to the complaint, contains a clause and condition which gave this defendant the right in case of default by the plaintiff of any of the payments, or the violation of any of the terms and conditions of the agreement, to re-enter and take possession of the tug James B. Stewart wherever she might be situated; and in that event, any and all payments previously made by the plaintiff were deemed to be and were to be applied solely as rental; and in case this defendant should re-enter and take possession of the said tug the plaintiff agreed to waive any and all claims that he has or had in and to the said tug.

By reason of the aforesaid provisions of the said agreement and because the subject matter of the contract was a vessel, to-wit: a steam tug duly enrolled in the Custom House in the Southern District of New York, the Personal Property Law of the State of New York relating to conditional sales does not apply in any respect to the afore-[fol. 38] said agreement and form a part thereof, but, on the contrary, was excluded in its application to the said agreement. This defendant accordingly is not under any obligation to return any part of the payments made by the plaintiff under the said agreement, but, on the contrary, is entitled to retain such payments and any further sums paid by the plaintiff to this defendant as rental for the said tug during the time that the tug was in the possession of and operated by the plaintiff.

As a second separate and distinct defense and as a set-off, this defendant, realleging the allegations hereinabove set forth, alleges as follows:

Twenty-fifth. Before the commencement of this action, and from April 17, 1919, to April 7, 1921, the said tug James B. Stewart was in the possession of and operated by the plaintiff for his own use and benefit. If the plaintiff is entitled to any recovery in this action, which this defendant denies, this defendant is entitled to set-off against such recovery the amount of the reasonable rental for the use of the said tug during the aforesaid period, which, so nearly as it can now be estimated, amounts to the sum of \$23,666.66, and the further sum of \$14,010.22 for disburse-

ments and advances made by this defendant for the repair, upkeep and insurance of the said tug during the aforesaid period at the request of and for the account of plaintiff, which the plaintiff agreed to pay to this defendant, or a total sum of \$37,676.88.

[fol. 39] As a third separate and distinct defense and as a set-off, this defendant alleges, on information and belief, as follows:

Twenty-sixth. At all the times hereinafter mentioned the plaintiff was and it still is a resident of the County of Queens, State of New York.

Twenty-seventh. At all the times hereinafter mentioned the defendant, James Stewart & Company, Inc., was and it still is a corporation duly organized and existing under and pursuant to the laws of the State of New York, with an office for the transaction of business at 30 Church Street, New York City.

Twenty-eighth. At all the times hereinafter mentioned James Stewart & Company was and it still is a corporation duly organized and existing under and pursuant to the laws of the State of New Jersey.

Twenty-ninth. At all the times hereinafter mentioned James Stewart & Company was and still is the owner of the steam tug James B. Stewart, and the said tug has been and still is enrolled in the Custom House in the Southern District of New York under the name of James Stewart & Company, as owner.

Thirtieth. On or about April 17, 1919, at New York, the defendant James Stewart & Company, Inc., as agent and for the benefit of the defendant James Stewart & Company, contracted with Dominick Rivara, of Rockaway Beach, New York, by an agreement in writing, in which James Stewart [fol. 40] & Company, Inc., was described as the Party of the First Part and Dominick Rivara as the Party of the Second Part, to sell to the said Rivara the tug James B. Stewart under certain terms and conditions, which provided that the said Rivara should operate the tug and make various payments, but that title to the tug should not pass until complete payments had been made by Rivara of the pur-

chase price. It was also provided in the said contract that the said Rivara should make payment by monthly installments of one thousand (\$1,000) dollars per month on or before the fifteen day of each month, until the entire purchase price should have been paid.

The said agreement annexed to the complaint herein as Schedule "A" contained among others the following provisions:

"In case of default by the Party of the Second Part of any of the payments or a violation of any of the terms and conditions of this agreement herein mentioned, the said Party of the First Part shall have the right to re-enter and take possession of the said tug wherever she may be situated, and in that event any and all payments previously made shall be deemed to be, and shall be, applied solely as rental, and in case of said re-entering and taking possession by the Party of the First Part, the said Party of the Second Part waives any and all claims that he has or had in or to the said tug."

"3. The Party of the Second Part agrees to keep the said [fol. 41] tug at all times in first-class repair and first-class condition to the satisfaction of the Party of the First Part * * * The Party of the Second Part further agrees that the said Party of the First Part will place insurance on the said tug for the full value of the boat * * * the premiums of which are to be paid by the Party of the Second Part * * *."

Thirty-first. The purchase price that the plaintiff agreed to pay for the tug was \$32,500. The plaintiff also agreed to pay for the premiums of insurance on the said tug and to indemnify and save harmless this defendant from any and all claims arising out of the operation or control of the said tug by the plaintiff, of every sort, nature or description.

Thirty-second. Thereafter Dominick Rivara made certain payments on account to this defendant, James Stewart & Company, Inc., for the owner of the said tug, under the said agreement of April 17, 1919, but did not make any payments in full after May 15, 1919, and the said Dominick Rivara therefore was in default under the said agreement from May 15, 1919.

Thirty-third. A statement of account was prepared by this defendant, as of January 25, 1921, showing that on that date there was due, owing and payable by Rivara to James Stewart & Company, Inc., the sum of \$24,078.85 under the agreement of April 17, 1919. A copy of this statement is annexed hereto and marked Schedule "A," and made a part of this answer. Dominick Rivara has admitted at various [fol. 42] times that this statement is correct and that the balance of \$24,078.85 is due from him to this defendant and that he has not made any payment on account thereof.

From January 25, 1921, to April 7, 1921, interest accrued on the said sum of \$24,078.85 amounting to \$288.95.

In violation of his obligations under the said agreement the plaintiff did not pay for various supplies and material ordered by him for the said tug, but among other sums admittedly due by him, improperly and wrongfully neglected and refused to pay the sum of \$179.84 properly and reasonably due from the plaintiff to Burns Brothers, coal dealers, for coal supplied to the said tug James B. Stewart, and ordered by the plaintiff prior to April 7, 1921. By reason of the premises the said tug was subject to a lien in favor of Burns Brothers for the sum of \$179.84. In order to free the said tug from the said lien it became necessary for this defendant, as agent, to pay, and it did pay, to Burns Brothers, before the commencement of this action, the sum of \$179.84

Subsequently, and before the commencement of this action, this defendant, as agent, was required to pay, and did pay, certain additional sums for the supplies, repairs and insurance on the said tug, which the plaintiff under the terms of the said agreement was obligated to pay, amounting to the sum of \$1,256.51.

The total of these sums amounts to \$25,804.15.

Thirty-fourth. Dominick Rivara admitted on March 3, 1921, and at various times that he was in default under the [fol. 43] said agreement and that he was obligated to return the said tug to this defendant, but he declined to return the said tug to this defendant unless this defendant would give to Rivara a general release of all claims against Rivara under the said contract of April 17, 1919.

Thirty-fifth. The failure on the part of the said Dominick Rivara to make payments as provided in the contract

of April 17, 1919, and the refusal of the said Rivara to return the said tug to this defendant, as agent for the owner of the tug, was wrongful and improper. By reason thereof the defendant, James Stewart & Company, became entitled to immediate possession of the said tug, and on March 19, 1921, a libel was filed in the United States District Court for the Southern District of New York against the said tug by James Stewart & Company, in the cause of possession, and on April 17, 1921, after a trial in which Dominick Rivara appeared personally and was represented by counsel, a final decree was signed by Judge A. N. Hand that the libelant was entitled to the immediate possession of the said tug and the marshal was directed to deliver the said tug to James Stewart & Company.

Thirty-sixth. By reason of the premises, if the plaintiff is entitled to any recovery in this action, which is denied, this defendant, as agent for James Stewart & Company, is entitled to set-off the sum of \$25,804.15, less the reasonable value of the tug James B. Stewart on April 7, 1921, which so nearly as can be estimated amounted to the sum of \$10,000, or \$15,804.15, against any such recovery against it.

[fol. 44] Wherefore this defendant prays that the complaint be dismissed with costs to this defendant as against the plaintiff, and that the Court may grant to this defendant such other and further relief as the justice of the cause may require.

Kirlin, Woodsey, Campbell, Hickox & Keating, Attorneys for Defendant, James Stewart & Company, Inc.

Office P. O. address, 27 William Street, Borough of Manhattan, City of New York.

Duly sworn to by W. R. Rowan. Jurat omitted in printing.

[fol. 45] EXHIBIT TO ANSWER (JAMES STEWART & COMPANY,
INC.)

Schedule A.

Statement of account showing purchase price and amount remaining unpaid as of January 25th, 1921, under agreement between James Stewart & Company, Inc., and Dominick Rivara for purchase of tug "James B. Stewart" dated April 17, 1919.

1919

April 17.	Purchase price of Tug James B. Stewart	\$32,500.00
April 17.	For Coil of 8" rope unfurnished	377.42
May 15.	Interest on balance of \$27,000.00 from April 17 to May 15—28 days	126.00
May 27.	Paid Deposit premium on Work- mens Compens. Ins. Policy year end. Apr. 17/20	218.70
June 15.	Interest on balance of \$22,377.42 from May 16 to June 15—31 days	115.62
June 15.	Interest on balance of \$218.70 from May 27 to June 15-30—19 days .....	.69
July 15.	Interest on balance of \$21,578.12 from June 16 to July 15—30 days	107.89
July 15.	Paid Marine Ins. Premium for 1 year ending April 17, 1920	4,262.75
Ang. 15.	Interest on balance of \$24,819.47 [fol. 46] from July 16 to Aug. 14—31 days	128.23
Sept. 15.	Interest on balance of \$24,823.41 from Aug. 16 to Sept. 15—31 days	\$128.25
Oct. 15.	Interest on balance of \$24,951.66 from Sept. 16 to Oct. 15—30 days	124.76
Nov. 15.	Interest on balance of \$25,076.42 from Oct. 16 to Nov. 15—31 days	129.56
Dee. 15.	Interest on balance of \$25,205.98 from Nov. 16 to December 15—30 days	126.03
1920		
Jan. 15.	Interest on balance of \$24,832.01 from Dec. 16 to Jan. 15—31 days	128.30
Feb. 15.	Interest on balance of \$24,460.31 from Jan. 16 to Feb. 15—31 days	126.38

Mar.	15.	Interest on balance of \$24,386.69 from Feb. 16 to Mar. 15—29 days	117.87
April	15.	Interest on balance of \$23,504.56 from Mar. 16 to April 15—31 days	121.44
May	15.	Interest on balance of \$22,626 from April 16 to May 15—30 days	113.13
May	17.	Paid deposit premium on Work- mens Compens. Ins. Policy year [fol. 47] end. Apr. 17/21	150.60
June	9.	Paid Marine Ins. Premium for 1 year ending April 17, 1921	3,840.63
June	15.	Interest on balance of \$21,539.13 from May 16 to June 15—31 days	111.28
June	15.	Interest on balance of \$150.60 from May 17 to June 15—29 days	.73
June	15.	Interest on balance c' \$3,840.63 from June 9 to June 15—6 days	3.84
July	2.	Paid bill covering cost of making re- pairs to Tug	876.46
July	2.	Paid Kingsford Foundry & Mach. Works for set of boiler grates	164.16
July	15.	Interest on balance of \$24,546.21 from June 16 to July 15—30 days	122.73
July	15.	Interest on balance of \$876.46 from July 2 to July 15—13 days	1.90
July	15.	Interest on balance of \$164.16 from July 2 to July 15—13 days	.36
Aug.	15.	Interest on balance of \$24,511.82 from July 16 to Aug. 15—31 days	126.64
Sept.	15.	Interest on balance of \$23,638.46 [fol. 48] from Aug. 15 to Sept. 15—31 days	122.13
Oct.	1.	Bill of Knickerbocker Brokerage Co. Ins. Marine Premium	548.77
Oet.	15.	Interest on balance of \$22,755.59 from Sept. 16 to Oct. 15—30 days	113.78
Oet.	27.	Bill of Merritt & Chapman Derrick & Wrecking Co. for services in con- nection with raising the tug	1,125.00
Nov.	15.	Interest on balance of \$21,869.37 from Oct. 16 to Oct. 27—12 days	43.74
Nov.	15.	Interest on balance of \$21,069.37 from Oct. 27 to Nov. 15—19 days	66.72

Dec.	15.	Interest on balance of \$21,179.83 from Nov. 16 to Dec. 15—30 days	105.89
1921			
Jan.	15.	Interest on balance of \$21,285.72 from Dec. 16 to Jan. 15—31 days	109.98
Jan.	19.	Bill of Knickerbocker Brokerage Co. Ins. Marine Ins. Premium	1,009.38
			<hr/>
			\$47,597.72

[fol. 49] Less Payments Made:

1919

April	17	.....	\$5,500.00
May	15	.....	5,126.00
June	16	.....	1,134.29
July	15	.....	1,129.29
Aug.	19	.....	124.29
Dec.	15	.....	500.00

1920

Jan.	15	.....	500.00
Feb.	17	.....	200.00
Mar.	23	.....	1,000.00
April	16	.....	1,000.00
May	17	.....	1,200.00
June	18	.....	1,100.00
July	15	.....	1,200.00
Aug.	16	.....	1,000.00
Sept.	14	.....	1,005.00
Oct.	16	.....	1,000.00
Oct.	27	.....	800.00
			\$23,518.87

Balance due James Stewart & Company,
Inc. \$24,078.85

E. & O. E.

Prompt payment of all amounts due to date is hereby demanded Jan. 25, 1921.

[File endorsement omitted.]

[Title omitted.]

REPLY (TO ANSWER OF JAMES STEWART & COMPANY)

Plaintiff for his reply to the alleged counterclaim set forth in the answer of defendant, James Stewart & Company, and referred to and designated therein "as a second, separate and distinct defense and a set-off and counter-claim"—

I. Denies each and every allegation therein contained except as herein specifically admitted.

II. Plaintiff admits that before the commencement of this action and from April 17th, 1919, to April 7th, 1921, the said tug James B. Stewart was in the possession of and operated by the plaintiff.

III. Denies each and every allegation contained in the title to said second alleged counterclaim and in paragraph Twenty-fifth thereof not herein or hereinafter specifically admitted.

[fol. 51] Plaintiff for his reply to the alleged counterclaim set forth in the answer of the defendant, James Stewart & Company, and referred to "as a third, separate and distinct defense and as a counterclaim in favor of this defendant against the plaintiff"—

IV. Admits paragraph Twenty-sixth thereof.

V. Admits the allegations of paragraph Twenty-seventh thereof, except that plaintiff denies he has any knowledge or information sufficient to form a belief as to that allegation in said paragraph to the effect that the defendant, James Stewart & Company, Inc., was and is the duly authorized agent of the defendant, James Stewart & Company.

VI. Admits paragraph Twenty-eighth thereof.

VII. Admits that at all the times mentioned in the Twenty-ninth paragraph of said answer and counter claim that the steam tug James B. Stewart was and it now is en-

rolled in the Custom House in the Southern District of New York, under the name of James Stewart & Company, as owner, and it denies any knowledge or information sufficient to form a belief as to any of the other allegations contained in said paragraph Twenty-ninth.

VIII. Plaintiff admits that on or about the 17th day of April, 1919, at New York, N. Y., the defendant, James B. Stewart & Company, Inc., entered into a contract in writing with the plaintiff, copy of which contract is annexed to the complaint and marked Schedule "A," and plaintiff [fol. 52] refers to said contract for the terms and conditions thereof, and plaintiff admits that the excerpts from said contract quoted and set forth in the Thirtieth paragraph of said counter claim and answer, commencing with the words "in case of default, etc.,," and ending with the words "party of the second part," are correct quotations from said contract, and plaintiff denies each and every allegation in the said Thirtieth paragraph not herein specifically admitted.

IX. Plaintiff admits that the purchase price that the plaintiff agreed to pay for the tug was \$32,500 and that plaintiff agreed to pay for the premiums of insurance on said tug as agreed between him and one T. F. Spellane, and that plaintiff would indemnify and save harmless the defendant James Stewart & Company, Inc., from any and all claims arising out of the operation and control by the said tug of the plaintiff, of every sort, nature and description.

X. Plaintiff admits that he made certain payments on account to the defendant, James Stewart & Company, Inc., under the said agreement of April 17th, 1919, and alleges he made payments on account of the purchase price of said tug, as set forth in Schedule "C" annexed to the complaint herein on the respective dates set forth therein, and plaintiff denies each and every allegation contained in paragraph Thirty-second of said answer not herein specifically admitted.

XI. Plaintiff admits that a statement of account was prepared by the defendant, James Stewart & Company, Inc., as of January 25th, 1921, showing that on that date there was

[fol. 53] due and owing and payable by plaintiff to James Stewart & Company, Inc., the sum of \$24,078.85, under the agreement of April 17th, 1919, and that a copy of said statement is annexed to the answer herein. Plaintiff admits that the said statement is correct and that he denies each and every other allegation in the Thirty-third paragraph of said answer contained except that he admits that he has made no payments on account of said sum.

XII. Plaintiff denies paragraph Thirty-fourth of said answer and counter claim.

XIII. Plaintiff admits that defendant, James Stewart & Company, filed a libel in the United States District Court for the Southern District of New York against the said tug in a cause of possession and that on April 7th, 1921, after a trial in which plaintiff appeared personally and was represented by counsel, a final decree was signed by Judge A. N. Hand to the effect that the libellant was entitled to the immediate possession of said tug and the Marshal was directed to deliver the said tug to James Stewart & Company, and plaintiff alleges that a memorandum opinion, a copy of which is annexed to the complaint herein and marked Schedule "D," was rendered by the Court in said action, and plaintiff denies each and every allegation in paragraph Thirty-fifth of said answer not herein specifically admitted.

XIV. Plaintiff denies paragraph Thirty-sixth of said answer and counter claim.

XV. Plaintiff denies paragraph Thirty-seventh of said answer and counter claim except that he admits that he has [fol. 54] paid no part of the sum of \$15,804.15.

XVI. Plaintiff denies paragraph Thirty-eighth of said answer and counter claim.

XVII. Plaintiff denies each and every allegation contained in the said alleged third separate and distinct defense and counter claim of said defendant, James Stewart & Company, not herein specifically admitted.

For a separate and distinct defense and reply to the said alleged counter claims of defendant, James Stewart & Company:

XVIII. Plaintiff pleads and restates all allegations, admissions and denials in this reply set forth and contained in paragraphs First to Seventeenth inclusive as though set forth at length in this paragraph and with the same force and effect.

The Plaintiff Alleges:

XIX. That this plaintiff is a resident of the County of Queens and the City and State of New York.

XX. That the defendant, James Stewart & Company, is now and was at all the times herein mentioned a foreign corporation under the Laws of the State of New Jersey and engaged in doing business in the State of New York, having an office for the regular transaction of business in said city.

[fol. 55] XXI. That the defendant, James Stewart & Company, Inc., is a domestic corporation under the Laws of the State of New York now and at all the times herein mentioned.

XXII. That on or about the 17th day of April, 1919, the plaintiff and defendants in the City of New York entered into an agreement, a copy of which is annexed to the complaint and marked Schedule "A" and is hereby made part of this reply as if herein set forth at length and in detail.

XXIII. That by operation of law the Personal Property Law of the State of New York relating to conditional sales was irrevocably written into the said agreement and formed a part thereof, and its contents were agreed to by plaintiff and defendants.

XXIV. That among other things the said Personal Property Law provides as set forth in Schedule "B" annexed to the complaint herein and made part hereof as if herein set forth at length and in detail.

XXV. That in pursuance of the said contract the defendants delivered the said tug James B. Stewart to the plaintiff on or about the 17th day of April, 1919, and the said tug remained in the possession of the plaintiff from that time up to the time she was retaken by the defendants from the plaintiff as hereinafter set forth.

XXVI. That in performance of said contract plaintiff made the payment to the defendants aggregating \$23,518.87 set forth in Schedule "C" annexed to the complaint [fol. 56] and made part hereof as if set forth herein at length and in detail and such payments were made at the time set forth in said Schedule "C."

XXVII. That subsequent to October 27th, 1920, plaintiff defaulted in his payments of one thousand (\$1,000) dollars a month as required by said agreement.

XXVIII. That plaintiff prior to April 7th, 1921, defaulted in the payments required to be made by him under the said agreement.

XXIX. That on or about April 7th, 1921, defendants without plaintiff's permission retook the said tug from plaintiff's possession and on information and belief still retain the same.

XXX. That on or about the 19th day of March, 1921, and while the said tug was still in the plaintiff's possession, a libel was filed by James Stewart & Company, one of the defendants herein, in the United States District Court for the Southern District of New York against the said tug, in a cause of possession, and after trial of the issues raised in the said action, the Trial Court handed down an opinion, a copy of which is attached to the complaint and marked Schedule "D" and made a part hereof as if herein set forth at length.

XXXI. That thereupon and on or about April 7th, 1921, a final decree was entered in the said action in the United States District Court, Southern District of New York, adjudging that James Stewart & Company, the libellant in [fol. 57] that action, one of the defendants herein, was entitled to the immediate possession of the said steam tug and directing the U. S. Marshal to deliver the said tug to James Stewart & Company forthwith.

XXXII. On information and belief that on or about the 7th day of April, 1921, the U. S. Marshal did deliver in pursuance of said decree the possession of the said tug to the defendants.

XXXIII. That within thirty (30) days after the delivery of the said tug to the defendants as aforesaid the plaintiff did not redeem the said tug nor comply with the terms of the said agreement, nor did the plaintiff make good his default and plaintiff did not receive back the said tug.

XXXIV. That after the expiration of the said thirty (30) days, neither the defendants nor either of them, nor their successors in interest, if any, sold the said tug at public auction.

XXXV. That after the delivery of the said tug to the defendants by the U. S. Marshal as aforesaid, neither the defendant nor either of them nor their successors in interest, if any, sold the said tug in accordance with the provisions of the Personal Property Law of the State of New York.

XXXVI. That said tug was not sold within thirty (30) days after the expiration of the period of thirty (30) days above named, during which plaintiff did not comply with the terms of the said agreement, nor has the said tug been sold at any time at public auction since the time she was delivered to the defendant by the said Marshal.

[fol. 58] XXXVII. That the defendants did not give notice required by Section No. 66 of the said Personal Property Law set out in said Schedule "B" annexed to the complaint.

XXXVIII. That the defendants did not give any notice to plaintiff of the sale of said steam tug at public auction or otherwise after delivery of the said tug to the defendant by the U. S. Marshal as aforesaid.

XXXIX. That on plaintiff's failure to redeem by complying with the contract within thirty (30) days after the tug was redelivered to the defendants by the U. S. Marshal as aforesaid, and defendants' failure to sell the said tug on due notice within the period of thirty (30) days as aforesaid, pursuant to said Statute, the plaintiff is entitled to recover of the defendants the several sums with interest from the various dates set forth in said Schedule "C" pursuant to Section No. 65 of the aforesaid Personal Property Law of the State of New York relating to conditional sales.

XL. That by reason of the premises there is due and owing from defendants to plaintiff the sum of \$23,518.87 with interest on the various sums making up the said sum from the respective dates set opposite said sums in said Schedule "C" annexed to the complaint herein.

XLI. That plaintiff has duly demanded of defendants payment of said sum and payment has been refused and no part of said sum has been paid to plaintiff by defendants or either of them.

[fol. 59] XLII. Plaintiff denies each and every allegation in said counter claims contained not herein specifically admitted.

XLIII. That by reason of the foregoing premises this plaintiff is indebted to the defendants in no sum whatsoever.

Wherefore, plaintiff demands judgment against the defendant, James Stewart & Company, dismissing the alleged counter claims interposed herein by the defendant's answer, and plaintiff also asks for the relief demanded in the complaint herein against both defendants.

Macklin, Brown, Purdy & Van Wyk, Attorneys for Plaintiff.

Office & P. O. address: 44 Beaver Street, Borough of Manhattan, City of New York.

*Duly sworn to by Dominick Rivara. Jurat omitted in
in printing.*

[fol. 60] IN SUPREME COURT OF NEW YORK

[Title omitted]

REPLY (TO ANSWER OF JAMES STEWART & COMPANY, INC.)—
Filed March 6, 1925

Plaintiff for his reply to the alleged setoff, set forth in the answer of defendant, James Stewart & Company, Inc., and referred to and designated therein "as a second, separate and distinct defense and a set-off"—

I. Denies each and every allegation therein contained except as herein specifically admitted.

II. Plaintiff admits that before the commencement of this action, and from April 17th, 1919, to April 7th, 1921, the said tug James B. Stewart was in the possession of and operated by the plaintiff.

III. Denies each and every allegation contained in the title to said second alleged set-off, and Paragraph "Twenty-Fifth" thereof, not hereinafter specifically admitted.

[fol. 61] Plaintiff for his reply to the alleged set-off set forth in the answer of the defendant, James Stewart & Company, Inc., and referred to "as a third separate and distinct defense and as a set-off"—

IV. Admits Paragraph "Twenty-Sixth" thereof.

V. Admits the allegations of Paragraph "Twenty-Seventh" thereof.

VI. Admits Paragraph "Twenty-Eighth" thereof.

VII. Admits that at all the times mentioned in the "Twenty-Ninth" paragraph of said answer and set-off that the steam tug James B. Stewart was, and now is, enrolled in the Custom House in the Southern District of New York under the name of James Stewart & Company, as owner, and it denies any knowledge or information sufficient to form a belief as to any of the other allegations contained in said Paragraph "Twenty-Ninth."

VIII. Plaintiff admits that on or about the 17th day of April, 1919, at New York, N. Y., the defendant, James B. Stewart & Company, Inc., entered into a contract in writing with the plaintiff, a copy of which contract is annexed to the complaint and marked Schedule "A," and plaintiff refers to said contract for the terms and conditions thereof, and plaintiff admits that the excerpts from said contract quoted and set forth in the "Thirtieth" paragraph of said set-off and answer, commencing with the words "in case of [fol. 62] default, etc.,," and ending with the words "party of the second part," are correct quotations from said contract, and plaintiff denies each and every allegation in the said "Thirtieth" paragraph not herein specifically admitted.

IX. Plaintiff admits that the purchase price that the plaintiff agreed to pay for the tug was \$32,500, and that plaintiff agreed to pay for the premiums of insurance on said tug as agreed between him and one T. F. Spellane, and that plaintiff would indemnify and save harmless the defendant, James Stewart & Company, Inc., from any and all claims arising out of the operation and control of the said tug by the plaintiff, of every sort, nature and description.

X. Plaintiff admits that he made certain payments on account to the defendant, James Stewart & Company, Inc., under the said agreement of April 17th, 1919, and alleges that he made payments on account of the purchase price of said tug, as set forth in Schedule "C," annexed to the complaint herein, on the respective dates set forth therein, and plaintiff denies each and every allegation contained in Paragraph "Thirty-Second" of said answer not herein specifically admitted.

XI. Plaintiff admits that a statement of account was prepared by the defendant, James Stewart & Company, Inc., as of January 25th, 1921, showing that on that date there was due and owing and payable by plaintiff to James Stewart & Company, Inc., the sum of \$24,078.85 under the agreement of April 17th, 1919, and that a copy of said statement [fol. 63] is annexed to the answer herein. Plaintiff admits that the said statement is correct and that he denies each and every other allegation in the "Thirty-third" paragraph of said answer contained except that he admits that he has made no payments on account of said sum.

XII. Plaintiff denies Paragraph "Thirty-Fourth" of said answer and alleged set-off.

XIII. Plaintiff admits that defendant James Stewart & Company, filed a libel in the United States District Court for the Southern District of New York against the said tug in a cause of possession and that on April 7th, 1921, after a trial in which plaintiff appeared personally and was represented by counsel, a final decree was signed by Judge A. N. Hand to the effect that the libellant was entitled to the immediate possession of said tug and the Marshal was directed to deliver the said tug to James Stewart & Company, and

plaintiff alleges that a memorandum opinion, a copy of which is annexed to the complaint herein and marked Schedule "D," was rendered by the Court in said action, and plaintiff denies each and every allegation in Paragraph "Thirty-Fifth" of said answer not herein specifically admitted.

XIV. Plaintiff denies Paragraph "Thirty-Sixth" of said answer and alleged set-off.

XV. Plaintiff denies each and every allegation contained in the said alleged "Third, Separate and Distinct Defense and Set-off" of said defendant, James Stewart & Company, Inc., not herein specifically admitted.

[fol. 64] For a separate and distinct defense and reply to the said alleged set-offs of defendant, James Stewart & Company, Inc.—

XVI. Plaintiff pleads and restates all allegations, admissions and denials in this reply set forth and contained in paragraphs "First" to "Fifteenth," inclusive, as though set forth at length in this paragraph, and with the same force and effect.

The plaintiff alleges:

XVII. That this plaintiff is a resident of the County of Queens and the City and State of New York.

XVIII. That the defendant James Stewart & Company, is now and was at all the times herein mentioned a foreign corporation under the Laws of the State of New Jersey, and engaged in doing business in the State of New York, having an office for the regular transaction of business in said City.

XIX. That the defendant, James Stewart & Company, Inc., is a domestic corporation under the Laws of the State of New York now and at all the times herein mentioned.

XX. That on or about the 17th day of April, 1919, the plaintiff and defendants in the City of New York entered into an agreement, a copy of which is annexed to the complaint and marked Schedule "A" and is hereby made part of this reply as if herein set forth at length and in detail.

[fol. 65] XXI. That by operation of law the Personal Property Law of the State of New York relating to conditional sales was irrevocably written into the said agreement and formed a part thereof, and its contents were agreed to by plaintiff and defendants.

XXII. That among other things the said Personal Property Law provides, as set forth in Schedule "B," annexed to the complaint herein and made part hereof as if herein set forth at length and in detail.

XXIII. That in pursuance of the said contract, the defendants delivered the said tug James B. Stewart to the plaintiff on or about the 17th day of April, 1919, and the said tug remained in the possession of the plaintiff from that time up to the time she was retaken by the defendants from the plaintiff as hereinafter set forth.

XXIV. That in performance of said contract plaintiff made the payment to the defendants aggregating \$23,518.87 set forth in Schedule "C," annexed to the complaint and made part hereof as if set forth herein at length and in detail, and such payments were made at the times set forth in said Schedule "C."

XXV. That subsequent to October 27th, 1920, plaintiff defaulted in his payments of One Thousand Dollars (\$1,000) a month, as required by said agreement.

XXVI. That plaintiff prior to April 7th, 1921, defaulted [fol. 66] in the payments required to be made by him under the said agreement.

XXVII. That on or about April 7th, 1921, defendants without plaintiff's permission, retook the said tug from plaintiff's possession, and, on information and belief, still retain the same.

XXVIII. That on or about the 19th day of March, 1921, and while the said tug was still in the plaintiff's possession a libel was filed by James Stewart & Company, one of the defendants herein, in the United States District Court for the Southern District of New York, against the said tug, in a cause of possession, and after trial of the issues raised in the said action, the Trial Court handed down an opinion, a copy of which is attached to the com-

plaint, and marked Schedule "D," and made a part hereof as if herein set forth at length.

XXIX. That thereupon, and on or about April 7th, 1921, a final decree was entered in the said action in the United States District Court, Southern District of New York, adjudging that James Stewart & Company, the libellant in that action, one of the defendants herein, was entitled to the immediate possession of the said steamtug, and directing the U. S. Marshal to deliver the said tug to James Stewart & Company forthwith.

XXX. On information and belief, that on or about the 7th day of April, 1921, the U. S. Marshal did deliver, in pursuance of said decree, the possession of the said tug to the defendants.

[fol. 67] XXXI. That within thirty (30) days after the delivery of the said tug to the defendants as aforesaid, the plaintiff did not redeem the said tug nor comply with the terms of the said agreement, nor did the plaintiff make good his default, and plaintiff did not receive back the said tug.

XXXII. That after the expiration of the said thirty (30) days, neither the defendants, nor either of them, nor their successors in interest, if any, sold the said tug at public auction.

XXXIII. That after the delivery of the said tug to the defendants by the U. S. Marshal, as aforesaid, neither the defendants, nor either of them, nor their successors in interest, if any, sold the said tug in accordance with the provisions of the Personal Property Law of the State of New York.

XXXIV. That said tug was not sold within thirty (30) days above named, during which plaintiff did not comply with the terms of the said agreement, nor has the said tug been sold at any time at public auction since the time she was delivered to the defendant by the said Marshal.

XXXV. That the defendants did not give notice required by Section No. 66 of the said Personal Property Law, set out in said Schedule "B," annexed to the complaint.

XXXVI. That the defendants did not give any notice to plaintiff of the sale of the said steamtug at public auc-

tion, or otherwise, after delivery of the said tug to the defendant by the U. S. Marshal, as aforesaid.

XXXVII. That on plaintiff's failure to redeem by complying with the contract within thirty (30) days after the tug was redelivered to the defendants by the U. S. Marshal, as aforesaid, and defendant's failure to sell the said tug on due notice within the period of thirty (30) days as aforesaid, pursuant to said Statute, the plaintiff is entitled to recover of the defendants the several sums with interest from the various dates set forth in said Schedule "C," pursuant to Section No. 65 of the aforesaid Personal Property Law of the State of New York relating to conditional sales.

XXXVIII. That by reason of the premises, there is due and owing from defendants to plaintiff the sum of \$23,518.87 with interest on the various sums making up the said sum, from the respective dates set opposite said sums in said Schedule "C," annexed to the complaint herein.

XXXIX. That plaintiff has duly demanded of defendants payment of said sum, and payment has been refused and no part of said sum has been paid to plaintiff by defendants, or either of them.

XL. Plaintiff denies each and every allegation in said alleged set-offs contained, not herein specifically admitted.

XLI. That by reason of the foregoing premises, this plaintiff is indebted to the defendant in no sum whatsoever.

[fol. 69] Wherefore plaintiff demands judgment against the defendant James Stewart & Company, Inc., dismissing the alleged set-offs interposed herein by the said defendants' answer, and plaintiff also asks for the relief demanded in the complaint against both defendants.

Macklin, Brown, Purdy & Van Wyk, Attorneys for Plaintiff.

Office & Post Office address: 44 Beaver Street, Borough of Manhattan, City of New York.

Duly sworn to by Dominick Rivara. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 70] IN SUPREME COURT OF NEW YORK

[Title omitted]

FINDINGS OF FACT AND CONCLUSIONS OF LAW—Filed March 3, 1925

The issues raised by the answers of the defendants coming on for trial at the Queens County Trial Term in Part I thereof, before the undersigned (a jury trial having been waived), and said issues having been tried by the Court on the third day of February, 1925, and the allegations and evidence of the parties having been duly heard, and the proofs duly taken and considered; after due deliberation thereon, I decide and find as follows:

Findings of Fact

First. The defendant, James Stewart and Company, was, and is, a corporation organized and existing under the laws of the State of New Jersey. The other defendant, James Stewart & Company, Inc., is a corporation, organized and existing under the laws of the State of New York.

[fol. 71] **Second.** On April 17, 1919, the defendant, James Stewart & Company, Inc. (for and on behalf of the co-defendant, James Stewart & Co. owner of the steamtug James B. Stewart, which agency was not then disclosed to plaintiff), made an executory contract, as party of the first part, with plaintiff as party of the second part, in consideration of the first payment of \$5,500 for the sale of the steamtug James B. Stewart to said plaintiff for a total price of \$32,500. Said defendant was to reserve title to said tug until the balance of said purchase price (which was to be payable in installments) should have been fully paid. Schedule A, annexed to the complaint, is a true copy of such contract.

Third. The plaintiff thereupon took possession of said tug and operated her in commerce, both inter state and intra state, and made payments on account of such purchase after his first payment of \$5,500 on April 17th, 1919, and up to October 27th, 1920, which payments amounted in all to \$23,518.87. The plaintiff in said contract also

agreed to keep the said tugboat free from all claims, or libels; and to save harmless the owner from all claims arising from its operation and control, and likewise agreed that the defendants should keep the tug insured, for which the plaintiff was to pay the defendants the premiums therefor; and in default of such payments, or on a violation of any of the terms and conditions of such agreement, the said party of the first part was given the right to re-enter and take possession of the said tug, in which event the contract provided that:

[fol. 72] "All payments previously made shall be deemed to be, and shall be, applied solely as rental; and in case of such re-entering and taking possession, the party of the second part waives any and all claims that he has, or had, in and to the said tug."

A copy of this contract was filed in the office of the Register of the County of Queens on April 30th, 1919. But no refiling thereof in said office ever took place.

Fourth. The plaintiff stopped and defaulted in his payments under said contract, and made no payments thereon after October 27th, 1920.

Fifth. Plaintiff being thus in default, to the amount of \$24,078.85, as per a statement presented to him on January 25th, 1921, the defendant, James Stewart & Company, filed a libel in Admiralty for the possession of said steamtug, in the District Court of the United States for the Southern District of New York, in which proceeding a decree, of which a copy is annexed to the complaint herein, was made by the Honorable Augustus N. Hand, on April 7th, 1921, under which the libellant therein and defendant in this suit recovered possession of said tugboat.

Sixth. On or about November 1st, 1921, the plaintiff herein (without having made further payments) began this action to recover back the payments made by him on account of said tugboat, proceeding on the alleged ground that the provisions of the Personal Property Law of the State of New York (Consolidated Laws, Chapter 41) applied to this [fol. 73] contract for the purchase of said steamtug, inasmuch as such act provided (Sec. 65) that in case of retaking of articles, sold on condition that the title thereto shall remain in the vendor, if the same are retaken by the vendor.

"or his successor in interest, they shall be retained for a period of thirty days from the time of such retaking, and during such period the vendee or his successor in interest may comply with the terms of such contract and thereupon receive such property. After the expiration of such period if such terms are not complied with, the vendor or his successor in interest, may cause such articles to be sold at public auction, unless such articles are so sold within thirty days after the expiration of such period, the vendee, or his successor in interest, under the contract may recover of the vendor the amount paid on such articles by such vendee or his successor, in interest under the contract for the conditional sale thereof."

Seventh. During the time when said steam-tug was in the plaintiff's possession, its fair rental value, as agreed in open Court, was at the rate of \$1,000 a month, which for the period of such use amounts to the sum of \$24,000.

Eighth. Said tugboat was at all times documented by its owner, James B. Stewart & Company, a New Jersey corporation, in the Custom House at the port of New York, under the laws of the United States as a vessel of the United [fol. 74] States and was duly enrolled under the said laws for coasting voyages between ports of the United States.

Ninth. Plaintiff's payments on the contract for purchase of said tugboat are \$23,518.87; interest thereon from November 1st, 1921, \$4,586.17—total, \$28,105.04. Various payments by the defendant, James Stewart & Company, Inc., under the terms of said contract, as per schedule in the stipulation filed herein are agreed upon as to amounts only as follows:

	Amount	Interest	Total
Schedule B.....	\$4,416 58	\$464 17	\$4,880 75
“ C.....	10,907 29	3,233 68	14,140 97
Paragraph 4 of answer.....	179 84	41 22	221 06
Aggregating			\$19,242 78
Balance in favor of plaintiff			\$8,862 26

Conclusions of Law

1. The reasonable rental value of said tug while in plaintiff's employment is not a subject of credit or allowance to the defendants, or either of them, because the Courts of New York (*Crowe v. Liquid Carbonic Company*, 208 N. Y. 396) have held this clause attempting to waive the provisions of the Statute to be void and unenforceable.

2. Although the tug was engaged in interstate commerce and was enrolled in the United States Custom House, New [fol. 75] York, it must now be held (over the objection of the defendant's counsel that the tugboat as a vessel of the United States was not subject to the Personal Property Laws of the State of New York, and that to hold it subject to such laws is contrary to the Constitution and laws of the United States) that the conditional sale of such tugboat is subject to the provisions of the Personal Property Laws of New York, since, motions for judgment upon the pleadings herein, it was so ruled in this case, at Special Term (119 Misc. 73) which was affirmed by the Appellate Division of this Department (204 Appellate Division 890) which order the Court of Appeals affirmed, holding that the complaint stated a cause of action, and without deciding on the application or constitutionality of the Personal Property Laws of the State of New York (236 N. Y. 601).

3. The sections of the Personal Property Law of the State of New York as now applied to the conditional sale of the tugboat James B. Stewart are within the power of the Legislature of the State of New York and are not repugnant to the Constitution and laws of the United States.

4. The plaintiff is entitled to Eight Thousand Eight Hundred and Sixty-two and 26/100 Dollars (\$8,862.26) as a net recovery after allowing to the defendants herein all counterclaims, with interest, amounting to Nineteen Thousand Two Hundred and Forty-two and 78/100 Dollars (\$19,242.78) as set forth in paragraph Ninth hereof.

5. The plaintiff having been required by me to elect against which of the two defendants he will demand judgment; and he having elected to claim judgment against the defendant, James Stewart & Company, judg-

ment for the plaintiff against defendant, James Stewart & Company is therefore directed for the sum of Eight Thousand Eight Hundred and Sixty-two and 26/100 Dollars (\$8,862.26) with costs, to be taxed by the Clerk and the Clerk is directed to enter judgment accordingly.

Agreed as to form.

Macklin, Brown & Van Wyck.

Agreed as to form.

L. B. Faber, J. S. C.

[File endorsement omitted.]

[fol. 77] IN SUPREME COURT OF NEW YORK

[Title omitted]

PLAINTIFF'S EXCEPTIONS TO FINDINGS OF FACT—Filed March
13, 1925

Plaintiff excepts to so much of the Ninth Finding of Fact in the Decision of this Court filed herein on March 3rd, 1925, as allows the defendant the counterclaim in Schedule C of \$10,907.29 with interest, making in all \$14,140.97 and limiting the net balance in plaintiff's favor to \$8,862.26, on the grounds that no evidence of said counterclaim was offered to the Court, and its allowance was contrary to the evidence and against the weight of the evidence and as a matter of law, such counterclaim could not be proven under the provisions of the Personal Property Law of the State of New York relating to conditional Sales and the allowance of said counterclaim would be an evasion of the said statute.

Plaintiff also excepts to the conclusion of law numbered "4."

Plaintiff also excepts to the conclusion of law numbered "5" in so far as it limits the direction of a judgment in [fol. 78] favor of plaintiff to the sum of \$8,862.26 and plaintiff excepts to the refusal of the Court to direct judgment in

favor of plaintiff for the full amount of plaintiff's claim as set forth in the complaint herein.

Macklin, Brown & Van Wyk, Attorneys for Plaintiff.

Office & P. O. Address: No. 44 Beaver Street, New York City.

To Kirlin, Woolsey, Campbell, Hickox & Keating, attorneys for defendant; Clerk of the County of Queens.

[File endorsement omitted.]

[fol. 79] IN SUPREME COURT OF NEW YORK

[Title omitted]

DEFENDANT JAMES STEWART & COMPANY'S EXCEPTIONS TO
FINDINGS OF FACT—Filed March 7, 1925

Defendant, James Stewart & Co., hereby excepts to the decision of Mr. Justice Leander B. Faber herein filed in the office of the Clerk of the County of Queens on the 3rd day of March, 1925, in the following particulars:

1. To the first conclusion of law, that defendants are not entitled to counterclaim against plaintiff the reasonable rental value of the tugboat James B. Stewart while in possession of plaintiff which was specifically provided in the contract of sale in Paragraph I thereof.

2. To the second conclusion of law, that the conditional sale of the tugboat James B. Stewart is subject to the provisions of Sections 65 and 66 of the Personal Property Law (Laws of 1909 Chap. 45) of the State of New York, in which the Court has held and determined that such provisions of said State law apply to said tugboat.

[fol. 80] 3. To the third conclusion of law, that the sections of the Personal Property Law of the State of New York as applied to the conditional sale of the tugboat James B. Stewart are within the power of the Legislature of the State of New York and are not repugnant to the Constitution and laws of the United States.

4. To the fourth conclusion of law, that plaintiff is entitled to recover the sum of \$23,518.87 with interest from

November 1, 1921, amounting to \$4,586.17 totalling \$28,-105.04 being the plaintiff's payments upon such contract of sale.

5. To the refusal of the Court to hold, as requested by defendants, that the conditional sale of the tugboat James B. Stewart documented in the Custom House at the Port of New York under the laws of the United States as a vessel of the United States and engaged in interstate commerce, is not subject to the Personal Property Law of the State of New York.

6. To the refusal of the Court to hold, as requested by the defendants, that the said provisions of the Personal Property Law of the State of New York, do not apply to the conditional sale of the tugboat herein and further that if such statutes he held applicable then they are contrary to the Constitution and Laws of the United States.

7. To the Court's direction of any judgment herein in favor of the plaintiff.

8. To the refusal of the Court to direct judgment for the defendant James Stewart & Co. for the sum of \$19,242.78 being the sum due to that defendant, as found in the Ninth [fol. 81] finding of fact in the decision herein.

Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for Defendant James Stewart & Company.

Office and Post Office address: 27 William Street, Borough of Manhattan, New York City.

To Macklin, Brown, Purdy & Van Wyck, Esqs., 44 Beaver Street, New York City; Edward W. Cox, Esq., Clerk of Queens County.

[File endorsement omitted.]

[fol. 82] IN SUPREME COURT OF NEW YORK

[Title omitted]

MINUTE ENTRIES—February 3, 1925

This cause having been called in its regular order on the calendar—

Jury waived.

Judgment for the plaintiff against James Stewart & Co. directed by the Court for Eight Thousand Eight Hundred and Sixty-two and 26/100 Dollars (\$8,862.26).

A true extract from the minutes.

Edward W. Cox, Clerk.

[fol. 83] IN SUPREME COURT OF NEW YORK

[Title omitted]

JUDGMENT—Filed March 6, 1925

The issues in this action having been brought on for trial before Mr. Justice Leander B. Faber, at a Trial Term of this Court, held on the third day of February, 1925, at the County Court House in the County of Queens, City of New York and both sides having waived a jury and the issues having been duly tried without a jury and the Court after due deliberation directed judgment against the defendant James Stewart & Company for the sum of \$8,862.26, and having thereafter, on the third day of March, 1925, duly made and filed a decision in favor of the plaintiff and against the defendant James Stewart & Company containing a statement of the facts found and the conclusions of law thereon, and directing judgment in favor of the plaintiff and against the defendant James Stewart & Company with costs and the plaintiff's costs having been duly adjusted at \$126.75,

[fol. 84] Now, on motion of Macklin, Brown, Purdy & Van Wyck, attorneys for plaintiff, it is

Adjudged that the plaintiff recover of the defendant James Stewart & Company the sum of \$8,862.26 together with the sum of \$126.75 costs as taxed, making in all the sum of \$8,989.01, and that execution issue therefor.

Dated New York, N. Y., March 6, 1925.

Edward W. Cox, Clerk.

[File endorsement omitted.]

[fol. 85]

IN SUPREME COURT OF NEW YORK

[Title omitted]

CASE AND EXCEPTIONS

Before Hon. Leander B. Faber, Justice

Long Island City, February 3, 1925.

APPEARANCES OF COUNSEL

Macklin, Brown, Purdy & Van Wyck, Esqs. (Pierre M. Brown and R. F. Lenahan, of counsel), for the plaintiff.

Kirlin, Woolsey, Campbell, Hickox & Keating, Esqs. (Harrington W. Putnam and A. H. Combs, of counsel), for the defendants.

It was duly stipulated by and between counsel for the respective parties that a jury be waived.

COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Putnam: The defendant moves to amend the answer to include the following allegations. Your Honor remembers, there are two defendants, James Stewart & Co., and [fol. 86] James Stewart & Co., Inc., James Stewart & Co. Inc. is a New York company, James Stewart & Co., without that, is a New Jersey corporation. This is the proposed amendment:

"Defendant, James Stewart & Co., Inc., as agent for defendant James Stewart & Co., at the request and for the account of the plaintiff, Dominick Rivara, made certain other disbursements for the repair and upkeep of the Tug James B. Stewart, while the tug was in the possession of the plaintiff, under the contract of sale referred to herein, in the amount of \$2,750. The repairs constituting this amount were made by Chester H. Carl, and constituted a maritime lien on or against the Tug James B. Stewart."

Mr. Lenahan: I have no objection.

The Court: Motion granted. Are you going to read your stipulation in the record?

Mr. Lenahan: There is another question Judge Putnam raised which might become involved in it hereafter, the question of James Stewart & Co., a New York corporation, and James Stewart & Co., a New Jersey corporation.

The Court: I did not understand they were both corporations.

Mr. Lenahan: The contract as made, and attached to the complaint, was made with the New York corporation, and in their answer they set up that the New York corporation acted as an agent for the undisclosed principal. The principal, James Stewart & Co., the New Jersey corporation, they admit was not disclosed to us at the time of making the contract.

The Court: Well, that is all right.

[fol. 87] Mr. Lenahan: I will read the stipulation in so far as what I want of it:

"It is stipulated that the plaintiff made part payments on account of the purchase price of the Tug James B. Stewart of the several sums of money and at the times specified in schedule 'A' hereto annexed. The total amount thus paid by the plaintiff was the sum of \$23,518.87. And schedule 'A' is the same schedule as schedule 'C' annexed to the complaint."

With that stipulation, the plaintiff rests with the exception of the question of interest, which we will take up after Judge Putnam rests, I think. That is another incidental question.

Mr. Putnam: Before proceeding, your Honor, as the plaintiff has rested, the defendant moves to dismiss the complaint on the ground that Sections 65, 66 and 67 of the Personal Property Law of the State of New York do not apply to this vessel, and that the cause of action based upon the provisions of the Personal Property Law does not apply to a vessel documented in the Custom House and engaged in interstate commerce.

The Court: Motion denied.

Mr. Putnam: Exception. I will read now the further part of the stipulation, the plaintiff's counsel having read paragraph 1.

"2. The defendant James Stewart & Co., Inc., as agent for the defendant James Stewart & Co., at the request and

for the account of the plaintiff, Dominick Rivara, made certain disbursements for the repair and upkeep of the Tug James B. Stewart, while the tug was in the possession of [fol. 88] the plaintiff under the contract of sale referred to in the complaint herein, in the amount of \$4,416.58. The annexed schedule 'B' is a true statement showing the amount, nature of, and the dates of payment of these various disbursements. The amounts were reasonable.

"3. The defendant James Stewart & Co., Inc., as agent for the defendant James Stewart & Co., made certain disbursements for the repair and insurance of the Tug James B. Stewart, while the tug was in the possession of the plaintiff under the contract of sale referred to in the complaint herein, in the amount of \$10,907.29. The annexed schedule 'C' is a true statement showing the amount, nature of, and the dates of the payment of these various disbursements. The amounts paid were reasonable."

Mr. Lenahan: I object to that as not proper in this action, on the ground it is incompetent, irrelevant and immaterial. This stipulation is made of course with the exception that we can object to this as proper proof.

The Court: It cannot be much of a stipulation if it is susceptible to objection. Is that the understanding, that you can object to what you have stipulated?

Mr. Combs: To the relevancy, yes.

The Court: The objection is made at the end of which paragraph?

Mr. Lenahan: Paragraph 3 of the stipulation.

The Court: Objection overruled.

Mr. Lenahan: That is one point we would like to argue, if your Honor would want to reserve the whole matter for briefs.

The Court: I will reserve decision on the objection.

[fol. 89] Mr. Putnam: I ought to say this is set up in the pleadings, but of course, I do not wish them to be excluded from making any objection they see fit.

The Court: I got the impression at the outset you had stipulated as to the facts and everything contained in the stipulation. If objection is going to be made to the things stipulated, then there is no stipulation.

Mr. Lenahan: The only thing stipulated is that James B. Stewart did pay these amounts. The question is whether

that is a proper counterclaim, as a matter of law, on the ground the retaking of a tug under conditional sale is a total rescission of the whole contract.

Mr. Putnam: On that point we come back to Judge Fawcett. Judge Fawcett held that those were recoverable, and if one follows him on one side I think the rule might extend to the other side.

The Court: I should think so. I will rule on that now. I will overrule the objection.

Mr. Lenahan: Exception.

Mr. Putnam: I will read the fourth subdivision:

"4. While the tug was in the possession of the plaintiff, under the contract of sale referred to in the complaint herein, coal was furnished to the tug by Burns Brothers, at the request of and for the account of the plaintiff, amounting to \$179.84. This claim constituted a maritime lien on or against the Tug James B. Stewart, and the defendant James Stewart & Co. has paid this claim in full to Burns Brothers.

"5. The defendant James Stewart & Co., Inc., a New [fol. 90] York corporation, acted as agent for the defendant James Stewart & Co., a New Jersey corporation, as alleged in the answer. James Stewart & Co. were the owners of the Tug James B. Stewart at all the times referred to in the pleadings herein.

"6. The Steam tug James B. Stewart is and at the times mentioned in the pleadings herein was a steel screw sea-going vessel, built at Buffalo in 1918, and at the times referred to in the pleadings was enrolled at the Custom House, New York City, in the name of its owner, James Stewart & Co., a New Jersey corporation and licensed to be employed in the coasting trade.

"7. Defendants may offer at the trial proof of the alleged set-off and counterclaim as to the reasonable rental value of the tug while in the possession of plaintiff under the contract of sale.

"8. It is understood and agreed in this action that no proof of any alleged offsets and counterclaims other than those mentioned herein, particularly paragraphs 2, 3, 4 and 7, and schedules 'B' and 'C' herein, will be offered or made.

"9. It is stipulated and agreed that schedule 'A' annexed to the complaint is a true copy of the contract of sale referred to herein, and may be offered at the trial without further proof.

"10. It is stipulated and agreed that schedule 'D' annexed to the complaint is a true copy of Judge Augustus N. Hand's opinion in the possessory libel, and that it may be offered at the trial without further proof.

"11. It is stipulated and agreed that a true copy of the contract of sale referred to herein was filed on April 30, [fol. 91] 1919, in the County Clerk's office for the County of Queens, at Jamaica, Long Island. It is further stipulated and agreed that this contract of sale was never afterwards refiled."

That is, of course, the point on which the State law was not complied with.

The Court: You are claiming that this State law is not applicable here at all to this kind of a case, and that it is controlled and governed entirely by the Federal law?

Mr. Putnam: That is the position we have taken, but perhaps I ought to show your Honor the printed record, which contains annexed to the complaint the paragraphs of the statute which is the basis for this claim.

The Court: Won't I see that afterwards?

Mr. Putnam: I did not know whether you had it in print, your Honor. I thought perhaps it would be a little clearer.

To be more formal, we will offer this in evidence, because of the schedules annexed, which I did not read.

The Court: Is that the stipulation from which you read?

Mr. Putnam: Yes.

(Marked Defendants' Exhibit A.)

Mr. Putnam: I stated to your Honor that our reliance was on the Federal law, and perhaps your Honor has seen the decision very recently in which our Appellate Division was reversed on the Labor Law, holding that it is not in the power of the State to require scaffolding in connection with vessels. I will hand it up to your Honor.

The Court: Were you going to take some proof, Judge Putnam?

[fol. 92] Mr. Putnam: There are two witnesses I propose to call.

Mr. Lenahan: I could finish my case on the interest.

It is stipulated that the interest on the plaintiff's payments, the sum of \$23,518.87, calculated from the dates that the payments were made, amounts to the sum of \$7,311.97.

It is stipulated that the interest on the amount plaintiff claims, from the date of the retaking of the tug, is the sum of \$5,291.70.

Mr. Putnam: On the question of interest, if your Honor please, we perhaps ought to make the objection now. There are three different periods from which interest might be computed. Your Honor will see that the statute under which the plaintiff proceeds says that if the auction sale required is not complied with within the specified time, the conditional purchaser who is in default may recover, or his successor in interest may recover the payments so made, but it does not say with interest, and your Honor is familiar with the rule that where a statute creates a cause of action it must specify interest, if interest is to be included. I maintain that if they are entitled to the calculation of interest at all, it must be from the date of the demand. That is in this case the date in which the suit was brought, because they allege in the complaint that it is demanded or has been demanded, but no other date, and your Honor is very familiar with a similar question that arises with the law of stockholders' liability in corporations. The statute says that if certain things are not complied with the stockholder is answerable up to the amount of his stock, and the State of New York and other states have held that [fol. 93] that does not carry any interest with the amount of the stock, and it does carry interest but not until the beginning of the suit. And our contention is that this being a similar statute, in which the right is wholly statutory, if your Honor allows interest it should be from the date when the complaint was served, which I think is November 1, 1921. The summons was served November 1, 1921.

The Court: Do you stipulate as to the interest from that date?

Mr. Lenahan: The interest from that date amounts to \$4,586.17.

Mr. Putnam: If your Honor was to take it, you see the other interest was from the various payments, each record separately.

The Court: According to your theory, they are entitled to interest only from the demand or service of the complaint in this action, and that amounts to something over \$4,000. It is necessary to rule on that point just yet?

Mr. Putnam: No. Your Honor having the figures before you can use whichever is right.

Mr. Lenahan: If Judge Putnam is going to put in a brief, we can brief that question of interest.

Mr. Putnam: With respect to our disbursements, the amounts of which have already been proved by the stipulation, we have a computation of interest. All the disbursements that are claimed by the defendant under the stipulation amount to \$15,503.71, and interest from the dates of the disbursements amounts to \$3,739.06, making a total of \$19,242.78. If interest on those things is taken from the date of the retaking, April 7, 1921, the interest is \$2,900.57, making a total on that basis of \$18,404.28.

[fol. 94] WILLIAM ROHDE, of No. 107-55 120th Street, Richmond Hill, New York, called as a witness on behalf of the defendants, having first been duly sworn, testified as follows:

Direct examination by Mr. Combs:

Q. State whether or not you are a licensed pilot?
A. I am.

Q. For what waters?

A. New York harbor.

Q. And in the vicinity?

A. In the vicinity.

Q. How long have you had your license?

A. Six years.

Q. Did you ever operate the tug James B. Stewart?

A. Yes, sir.

Q. When?

A. In the year 1919, from some time in June until September.

Q. By whom were you employed?

A. Mr. Rivara.

Q. That is, Dominick Rivara?

A. Yes.

Q. Did you receive your pay from him?

A. Yes.

Q. At that time did Mr. Rivara have possession of the Tug James B. Stewart?

A. Yes.

Q. State what were the operations of the tug. That is, from what points the tug went and returned?

A. From Rockaway to Elizabethport, Arlington, Port Reading and South Amboy. Most of our work was from Staten Island Sound to Rockaway.

Q. As I understand it, you say that the tug operated and towed barges from various points in New Jersey to various points in New York?

A. Yes.

Q. Was that her regular business?

A. Yes.

Q. Do you know who succeeded you as captain of the tug?

[fol. 95] Mr. Brown: What is it you are trying to prove? That she was engaged in interstate commerce?

Mr. Combs: Yes.

Mr. Brown: We will agree she was engaged in interstate commerce and intrastate commerce.

Mr. Combs: If you are prepared to stipulate she was in interstate commerce.

Mr. Brown: And likewise intrastate commerce. There is no doubt about that. She was engaged in both interstate and intrastate commerce.

Mr. Combs: It is stipulated and agreed that the Tug James B. Stewart while in the possession of the plaintiff, Dominick Rivara, operated in interstate commerce, and also interstate commerce.

Cross-examination by Mr. Lenahan:

Q. Where did the boat tie up when you tied her up?

A. Rockaway.

Q. That is in the State of New York?

A. Yes.

Redirect examination by Mr. Combs:

Q. Did the tug go to Bridgeport?

A. Not while I was on it.

Q. Do you know whether she ever went there while Rvara had her?

Mr. Lenahan: I object to that.

The Court: Objection overruled. If he knows.

A. I am not certain.

[fol. 96] COLLOQUY BETWEEN COURT AND COUNSEL

Mr. Combs: It is stipulated and agreed that the tug was 60 feet long, 16 feet wide, and with a depth of 7 feet, and with a horse power of 150.

The Court: Is that this boat involved here?

Mr. Combs: Yes. I have a witness as to the rental value.

The Court: State what you are going to prove by this witness, he will make the objection, and I will rule on it.

Mr. Combs: I will state that this witness is going to testify to the rental value of the Tug James B. Stewart in 1919, 1920 and 1921.

Mr. Lenahan: For the purpose of what?

Mr. Combs: I won't state the purpose.

Mr. Lenahan: It is stipulated that during the times that the plaintiff had possession of the Steamtug James B. Stewart, the reasonable rental value for her, bare boat, was \$1,000 a month.

Mr. Combs: After making deductions for repairs.

Mr. Lenahan: All right.

The Court: I will allow interest from the date of the service of the summons and complaint. That amount is \$4,586.17. The defendants had some item of interest.

Mr. Putnam: \$3,739.06.

The Court: And dispute about the time that covers?

Mr. Lenahan: No.

The Court: All right. We have that disposed of. On [fol. 97] the merits of the case, as now tried, I will give judgment for the plaintiff.

Mr. Lenahan: I did not hear any ruling on the rental value.

The Court: The defendant not obtaining judgment here, the rental value is out of the case. I have given judgment to the plaintiff.

Mr. Putnam: The supposition might be that having had the use and occupation of this boat during this time, that they could not get back the payments without paying the rental value, but I am free to say under the State decisions when you are dealing with a chattel you are entitled to have the thing treated as completely broken, you might say, by the failure to sell. You do not get any rental value, and the defaulting purchaser gets back his money, and he has the use of the property too, and I suppose that same rule would apply here.

The Court: I think so.

Mr. Putnam: But I think we could make a finding for your Honor to put in, "That the rental value before me is proved as so much, which I disallow in the damages."

[fol. 98]

DEFENDANTS' EXHIBIT A

NEW YORK SUPREME COURT, COUNTY OF QUEENS

DOMINICK RIVARA, Plaintiff,

against

JAMES STEWART & COMPANY and JAMES STEWART & COMPANY,
INC., Defendants

It is hereby stipulated by and between the respective parties that the following facts are admitted and agreed to as if duly proved at the trial of this action but without prejudice to the right of any party to object to the materiality or relevancy of these facts, or to the right of any party to appeal:

1. That the plaintiff made part payments on account of the purchase price of the Tug James B. Stewart of the several sums of money and at the times specified in Schedule "A" hereto annexed. The total amount thus paid by the plaintiff was \$23,518.87.

2. The defendant, James Stewart & Company, Inc. as agent for the defendant, James Stewart & Company, at the request and for the account of plaintiff Dominick Rivara, made certain disbursements for the repair and upkeep of the Tug "James B. Stewart" while the tug was in the possession of the plaintiff under the contract of sale referred to in the complaint herein in the amount of \$4,416.58. The annexed Schedule "B" is a true statement showing the amount, nature of, and the date of payment of these various disbursements. [fol. 99] The amounts paid were reasonable.

3. The defendant James Stewart & Company, Inc., as agent for the defendant, James Stewart & Company, made certain disbursements for the repair and insurance of the Tug "James B. Stewart" while the tug was in the possession of the plaintiff under the contract of sale referred to in the complaint herein, in the amount of \$10,907.29. The annexed Schedule "C" is a true statement showing the amount, nature of, and the date of payment of these various disbursements. The amounts paid were reasonable.

4. While the tug was in the possession of the plaintiff under the contract of sale referred to in the complaint herein coal was furnished to the tug by Burns Brothers at the request of and for the account of the plaintiff, amounting to \$179.84. This claim constituted a maritime lien on or against the Tug James B. Stewart, and defendant, James Stewart & Company, has paid this claim in full to Burns Brothers.

5. The defendant, James Stewart & Company, Inc., a New York corporation acted as agent for the defendant, James Stewart & Company, a New Jersey corporation as alleged in the answer. James Stewart & Company were the owners of the Tug James B. Stewart at all times referred to in the pleadings herein.

6. The Steam tug James B. Stewart is and at the time mentioned in the pleadings herein was a steel screw, sea-going vessel built in Buffalo in 1918, and at the times referred to in the pleadings was enrolled at the Custom

House, New York City, in the name of its owner, James [fol. 100] Stewart & Company, a New Jersey corporation and licensed to be employed in the coasting trade.

7. Defendants may offer at the trial, proof of the alleged setoff and counterclaim as to the reasonable rental value of the tug while in possession of plaintiff under the contract of sale.

8. It is understood and agreed in this action that no proof of any alleged offsets and counterclaims other than those mentioned herein particularly in paragraphs 2, 3, 4 and 7 and Schedules "B" and "C" herein will be offered or made.

9. It is stipulated and agreed that Schedule "A" annexed to the complaint is a true copy of the contract of sale referred to herein, and that it may be offered at the trial without further proof.

10. It is stipulated and agreed that Schedule "D" annexed to the complaint is a true copy of Judge Augustus N. Hand's opinion in the possessory libel and that it may be offered at the trial without further proof.

11. It is stipulated and agreed that a true copy of the contract of sale referred to herein was filed on April 30th, 1919, in the County Clerk's office for the County of Queens at Jamaica, L. I. It is further stipulated and agreed that this contract of sale was never afterwards refiled.

Macklin, Brown, Purdy & Van Wyk, Attorneys for Plaintiff. Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for Defendants.

[fol. 101]

Schedule A

1919.	
April 17	\$5,500.00
May 15	5,126.00
June 16	1,134.29
July 15	1,129.29
Aug. 19	124.29
Dec. 15	500.00

1920.

Jan. 15		500.00
Feb. 17		200.00
Mar. 23		1,000.00
Apr. 16		1,000.00
May 17		1,200.00
June 18		1,100.00
July 15		1,200.00
Aug. 16		1,000.00
Sept. 14		1,005.00
Oct. 16		1,000.00
Oct. 27		800.00
		<hr/>
		\$23,518.87

[fol. 102]

Schedule B

Date	Item	Amount
1919.		
1920.		
Apr. 17.	Coil of 8" rope.....	377.42
July 2.	Kingsford Foundry Machine Works for set of boiler grates.....	164.16
1920.		
Dec. 16.	Repairs to tug by Chester H. Carl.....	2,750.00
Oct. 27.	Merritt & Chapman Derrick & Wreck- ing Co. for services in connection with raising tug	1,125.00
		<hr/>
		\$4,416.58

[fol. 103]

Schedule C

1919.		
May 27.	Deposit premium on Workmen's Com- pensation Insurance policy; year ending Apr. 17, 1920.....	218.70
July 15.	Marine Insurance Premium for one year end. April 17, 1920.....	4,262.75

Date	Item	Amount
1920.		
May 17.	Deposit premium on Workmen's Compensation Insurance policy, year ending Apr. 17, 1921.....	150.60
June 9.	Marine Insurance premium for one year ending Apr.....	3,840.63
July 2.	Repairs to tug.....	876.46
Oct. 1.	Marine Insurance premium (Knickerbocker Brokerage Company)..... 1921.	548.77
Jan. 19.	Marine Insurance premium (Knickerbocker Brokerage Company).....	1,009.38
		<hr/> \$10,907.29

Filed Apr. 6, 1925. Edward W. Cox, Clerk.

[fol. 104]

AFFIDAVIT OF NO OPINION

[Title omitted]

STATE OF NEW YORK,
County of New York, ss:

John M. Woolsey being duly sworn says:

I am a member of the firm of Kirlin, Woolsey, Campbell, Hickox & Keating, attorneys for James Stewart & Company, the appellant in this action and am familiar with all the proceedings herein.

No opinion was delivered by the Court below, except its decision embraced in its findings of fact and conclusions of law.

John M. Woolsey.

Sworn to before me this 19th day of March, 1925.
Eugene F. Girligan, Notary Public, Nassau County.
New York County Clerk's No. 602. Kings County
Clerk's No. 171. Commission expires March 30,
1926.

[fol. 105] STIPULATION SETTLING CASE

It is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing case contains all the evidence taken upon the trial and all exceptions of all parties and that an order may be entered herein settling the same as such and ordering the same on file without further notice.

Dated New York, March 19, 1925.

Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for James Stewart & Company, Defendant-Appellant. Macklin, Brown, Purdy & Van Wyck, Attorneys for Plaintiff-Respondent.

IN SUPREME COURT OF NEW YORK
ORDER SETTLING CASE

On the foregoing stipulation the above case on appeal which contains all the evidence and exceptions of all parties is hereby settled and ordered on file.

Dated New York, March —, 1925.

Leander B. Faber, J. S. C.

[fol. 106] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION

It is hereby stipulated by and between the attorneys for the respective parties hereto that the foregoing are the true copies of the judgment roll, the notice of appeal, the case and exceptions as settled and the whole thereof now on file in the office of the Clerk of the County of Queens, and that certification thereof is hereby waived and that an order directing the filing of the record in the Appellate Court may be entered without further notice.

Dated New York, March 19, 1925.

Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for James Stewart & Company, Defendant-Appellant. Macklin, Brown, Purdy & Van Wyck, Attorneys for Plaintiff-Respondent.

IN SUPREME COURT OF NEW YORK
ORDER TO FILE TRANSCRIPT OF RECORD

Pursuant to the foregoing stipulation, it is ordered that the foregoing printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, Second Judicial Department.

Dated New York, March —, 1925.

Leander B. Faber, J. S. C.

[fol. 107] IN SUPREME COURT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL TO THE COURT OF APPEALS—Filed July 15,
1925

SIRS: Please take notice that pursuant to leave granted by the Appellate Division of the Supreme Court for the Second Judicial Department, by its order dated June 15, 1925, and entered in the office of the Clerk of the said Appellate Division on June 19, 1925, and under Section 588, Sub-division 1, Clause 1, of the Civil Practice Act, the above defendant-appellant, James Stewart & Company, hereby appeals to the Court of Appeals of the State of New York from the judgment entered in the Office of the Clerk of Queens County, on the 15th day of July, 1925, on the order of the said Appellate Division of the Supreme Court, dated June 5, 1925, affirming the judgment entered herein in the Office of the Clerk of the County of Queens on March 6, 1925, as said order of affirmance was subsequently resettled by an order entered on June 12, 1925, of which a certified copy was filed in the office of the Clerk of Queens [fol. 108] County on the 12th day of June, 1925, and from each and every part of said judgment as well as the whole thereof.

This appeal is not only taken by the leave granted by said Appellate Division, but is also taken under the first clause of Section 588, Sub-division 1 of the Civil Practice Act, as an appeal from a judgment entered upon the

decision of said Appellate Division, which finally determines an action, where is directly involved the construction of the Constitution of the United States.

Dated New York, July 15, 1925.

Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for James Stewart & Company, Defendant-Appellant.

Office & P. O. address: 27 William Street Borough of Manhattan, City of New York.

To. Macklin, Brown & Van Wyck, Attorneys for Plaintiff-Respondent, 44 Beaver Street, N. Y. City; Edward W. Cox, Esq., Clerk of the County of Queens.

[File endorsement omitted.]

[fol. 109] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Title omitted]

ORDER ALLOWING APPEAL—Filed July 3, 1925

The above named James Stewart & Company, defendant-appellant, having moved for leave to appeal to the Court of Appeals from the order of this Court, entered on the 5th day of June, 1925, as the same has been resettled by order entered on the 12th day of June, 1925, and from the judgment entered thereon; and the motion having come on to be heard, and the papers and briefs of the respective parties in support thereof and in opposition thereto having been filed;

[fol. 110] Now on reading and filing the papers upon which said motion is based and the opposing papers, and on all papers upon which said appeal was heard, and due deliberation having been had thereon,

On motion of Harrington Putnam, of counsel for defendant-appellant,

It is ordered that said motion be, and the same is hereby granted, and this Court hereby certifies that in its opinion questions of law are involved which ought to be reviewed

by the Court of Appeals, also that such appeal is required in the interest of substantial justice.

Enter.

(Sgd.) William J. Kelly, Presiding Justice.

[File endorsement omitted.]

[fol. 111] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Title omitted.]

ORDER OF AFFIRMANCE—Filed May 29, 1925

The above named Dominick Rivara, the plaintiff, and James Stewart & Company, one of the defendants in this action having appealed to the Appellate Division of the Supreme Court from a Judgment of the Supreme Court entered in the office of the Clerk of the County of Queens the 6th day of March, 1925, and the said appeal having been submitted by Mr. Pierre M. Brown, of Counsel for the plaintiff-appellant-respondent and argued by Mr. Harrington Putnam, of Counsel for the defendant-respondent-appellant, and due deliberation having been had thereon.

It Is Ordered and Adjudged that the judgment so appealed from be and the same is hereby unanimously affirmed, and that the plaintiff-respondent recover of the defendant-appellant the costs of this appeal.

Enter.

William J. Kelly, Presiding Justice.

[fol. 113] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Title omitted.]

ORDER OF RESETTLEMENT OF THE ORDER OF AFFIRMANCE—
Filed June 12, 1925

The above named Dominick Rivara, the plaintiff, and James Stewart & Company, one of the defendants in this action having appealed to the Appellate Division of the

Supreme Court from a Judgment of the Supreme Court entered in the office of the Clerk of the County of Queens the 6th day of March, 1925, and the said appeal having been submitted by Mr. Pierre M. Brown, of Counsel for the plaintiff-appellant, and argued by Mr. Harrington Putnam, [fol. 114] of Counsel for the respondent, and due deliberation having been had thereon,

It Is Ordered and Adjudged that the judgment so appealed from be and the same is hereby unanimously affirmed, without costs of this appeal to either party.

IN SUPREME COURT OF NEW YORK

[Title omitted]

JUDGMENT OF AFFIRMANCE—Filed July 15, 1925

A judgment in the above entitled action having been entered in the office of the Clerk of Queens County on March 6, 1925, adjudging that the plaintiff herein recover from the defendant, James Stewart & Company, the sum of \$8,989.01, and the said defendant, James Stewart & Company, having appealed therefrom to the Appellate Division [fol. 115] of the Supreme Court for the Second Department, and the plaintiff having also appealed from so much of said judgment as limits the amount for which judgment is granted to the plaintiff to the sum of \$8,989.01, and from that part of said judgment alone, to the said Appellate Division of the Supreme Court for the Second Department, and the said Appellate Division of the Supreme Court for the Second Department having made its order dated June 5, 1925, as resettled by its order dated June 12, 1925, affirming the said judgment therefrom, without costs to any of the parties and the remittitur of the said Appellate Division having been set down and filed in this Court on the 12th day of June, 1925, in accordance with its said order directing that said judgment so appealed from be affirmed without costs, it is now,

By the Court,

Adjudged that the judgment entered herein in the Office of the Clerk of the County of Queens on March 6, 1925,

adjudging that the plaintiff recover of the defendant, James Stewart & Company, the sum of \$8,989.01, be and it hereby is affirmed, without costs to any of the parties herein.

Judgment this 15th day of July, 1925, at 11:05 A. M.

Edward W. Cox, Clerk.

[File endorsement omitted.]

[fol. 116] IN SUPREME COURT OF NEW YORK

OPINION—Filed December 7, 1925

Judgment unanimously affirmed with costs to plaintiff upon authority of Rivara v. James Stewart & Co. (204 App. Div. 890, affd. 236 N. Y. 601). We think the questions involved in these cross-appeals have been adjusted in the decisions rendered upon the former appeals from the order denying judgment upon the pleadings. There are no questions of fact involved, and the same arguments now advanced were presented to this Court upon the former appeal. It appears from examination of the points in the Court of Appeals that the same questions were presented upon the appeal to that court. Present, Kelly, P. J. Manning, Kelby, Young and Kapper, J. J.

[File endorsement omitted.]

[fols. 117 & 118] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION—Filed Dec. 7, 1925

It Is Hereby Stipulated by and between the attorneys for the respective parties hereto that the foregoing printed record contains true and correct copies of all the papers as filed with the Appellate Division, Second Department, upon which the Court acted in making the judgment and order appealed from herein; also notice of appeal to the Court of Appeals, order granting leave to appeal to the Court of Appeals, order of affirmance, judgment of affirmance, the order of settlement of the order of affirmance and the opinion of the Appellate Division, all of which are now on file in the office of the Clerk of the County of Queens.

Certification thereof by the Clerk of said county is hereby waived.

Dated New York, July 29, 1925.

Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for James Stewart & Company, Defendant-Appellant. Macklin, Brown & Van Wyck, Attorneys for Plaintiff-Respondent.

[File endorsement omitted.]

Compared. Monroe and Berg.

[fol 119] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

Supplemental Record

STATEMENT UNDER RULE 234

This case comes up for review pursuant to an order made by the Appellate Division of the Supreme Court, Second Department, dated October 9th, 1925, granting the plaintiff leave to appeal from the judgment and order of affirmance by said Appellate Division, Second Department as well as from the resettled order of affirmance which denied costs. Notice of appeal was served October 15, 1925.

The action was commenced by the voluntary appearance of defendants on January 13, 1922. The answers of defendants were served on March 21, 1922, and plaintiff's replies thereto on April 14, 1922. The defendant, James Stewart & Company, Inc., amended its answer at the trial. Plaintiff appeared by Macklin, Brown & Van Wyck, its attorneys, and the defendants by their attorneys, Kirlin, Woolsey, Campbell, Hickox & Keating. There have been no changes of any parties or attorneys.

[fol. 120] The defendant, James Stewart & Company, is also appealing from the said judgment of affirmance of the Appellate Division, Second Department, in this case, having been granted leave by said Appellate Division of the Supreme Court, Second Judicial Department, by order

dated the 15th day of June, 1925, and the record on appeal in this appeal being the same as in the appeal taken by the defendant, James Stewart & Company, the attorneys for the respective parties have stipulated by stipulation annexed hereto that both appeal be heard upon the record now on file in this Court in the appeal taken by the defendant, James Stewart & Company, herein and the additional papers filed by the plaintiff on his appeal herein as allowed by the Appellate Division, Second Department.

[fol. 121] [At this point the record filed by the defendant-appellant should be considered by this court with the same force and effect as though fully set forth herein. This is in pursuance to stipulation entered into between the parties and printed on page 111, et seq.]

[fol. 122] IN SUPREME COURT OF NEW YORK

[Title omitted.]

NOTICE OF APPEAL TO THE COURT OF APPEALS—Filed October
16, 1925

Sirs: Please take notice that pursuant to leave granted to him by an order of the Appellate Division of the Supreme Court, for the Second Judicial Department, dated the 9th day of October, 1925, and entered in the office of the Clerk of the said Appellate Division, on the 9th day of October, 1925, the above named plaintiff-appellant, Dominick Rivara, hereby appeals to the Court of Appeals of the State of New York, from the judgment entered in the office of the Clerk of the County of Queens, on the 15th day of July, 1925, on the order of the said Appellate Division, dated June 5th, 1925, affirming the judgment entered herein in the office of the Clerk of the County of Queens, on March 6th, 1925, as said order of affirmance was subsequently re-settled by an order entered on June 12th, 1925, of which a certified copy was filed in the office of the Clerk of Queens County, on the 12th day of June, 1925; said plaintiff-appellant appeals solely from so much of said judg-

[fol. 123] ment as limits plaintiff's recovery to the sum of \$8,989.01 against the defendant, James Stewart & Co., as being insufficient in amount and from that part of said order and judgment of affirmance alone.

Dated New York, N. Y., October 15, 1925.

Yours, etc., Macklin, Brown & Van Wyk, Attorneys
for Plaintiff-Appellant.

Office & P. O. address: No. 44 Beaver Street, Borough
of Manhattan, City of New York, N. Y.

To Messrs. Kirlin, Woolsey, Campbell, Hickox & Keating, attorneys for defendant-respondent. Office & P. O. address: No. 27 William Street, Borough of Manhattan, city of New York.

To Edward W. Cox, Esq., Clerk of County of Queens.

[File endorsement omitted.]

[fol. 124] IN SUPREME COURT OF NEW YORK, APPELLATE
DIVISION

[Title omitted]

ORDER ALLOWING APPEAL—Filed October 16, 1925

The above named Dominick Rivara, the plaintiff, having moved for leave to appeal to the Court of Appeals from the order of this Court, entered on the 5th day of June, 1925, as resettled, etc., and from the judgment entered thereon, herein; and the motion having duly come on to be heard and the papers and briefs of the respective [fol. 125] parties in support thereof and in opposition thereto having been filed:

Now on reading and filing the papers upon which said motion is based, and the opposing papers, and all the papers upon which the appeal was heard; and due deliberation having been had thereon,

On motion of Mr. Matthew P. Breen, of counsel for the plaintiff,

It is ordered that the said motion be and the same is hereby granted, and this Court hereby certifies that in its

opinion a question of law is involved which ought to be reviewed by the Court of Appeals.

Enter.

William J. Kelly, Presiding Justice.

[File endorsement omitted.]

[fol. 126] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

STIPULATION AS TO TRIALS AND PRINTING

It is hereby stipulated and agreed, by and between the attorneys for the respective parties herein, that the appeals taken by the plaintiff and the defendant from the judgment in this action entered in the office of the Clerk of the County of Queens, on July 15, 1925, be heard together on the case on appeal heretofore filed by the defendant and the additional papers filed by plaintiff on its appeal herein as allowed by the Appellate Division, Second Department; and that the cost of printing the case on appeal, already paid by the defendant, be shared equally between the plaintiff and the defendant.

Dated New York, October 10, 1925.

Macklin, Brown & Van Wyck, Attorneys for Plaintiff-Respondent-Appellant. Kirlin, Woolsey, Campbell, Hiecox & Keating, Attorneys for Defendant-Appellant-Respondent.

[fol. 127] IN SUPREME COURT OF NEW YORK

STIPULATION WAIVING CERTIFICATION—Filed December 7, 1925

It is hereby stipulated and agreed by and between the attorneys for the respective parties hereto that the foregoing Supplemental Record contains true and correct copies of the Statement Under Rule 234, Notice of Appeal to the Court of Appeals, Order on Motion Granting Leave to Ap-

peal, Stipulation as to Trials and Printing, constituting the plaintiff-appellant's additional papers to the Court of Appeals, all of which papers are now on file at the office of the Clerk of the County of Queens. Certification of the foregoing papers by the Clerk of said Court is hereby waived.

It is further stipulated and agreed that the record filed by the defendant-appellant with the Clerk of the Court of Appeals be and the same hereby is considered as part of this record with the same force and effect as though fully set forth herein.

Dated New York, October 17th, 1925.

Macklin, Brown & Van Wyck, Attorneys for Plaintiff-Appellant. Kirlin, Woolsey, Campbell, Hickox & Keating, Attorneys for Defendant-Respondent.

[File endorsement omitted.]

Compared. Monroe and Berg.

[fol. 128] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 129] IN SUPREME COURT OF NEW YORK

[Title omitted]

ORDER RE REMITTITUR—Filed December 7, 1925

The above named plaintiff having appealed to the Court of Appeals of the State of New York from that part of the judgment entered and filed in the office of the Clerk of the County of Queens on the 13th day of July, 1925, affirming that part of the judgment entered in this action on the 6th day of March, 1925, which limited plaintiff's recovery to the sum of \$8,989.01.

And the above named defendant having appealed to the Court of Appeals of the State of New York from the judgment entered and filed in the office of the Clerk of the County of Queens on the 15th day of July, 1925, affirming the judgment entered in this action on the 6th day of March 1925, adjudging that the plaintiff recover the sum of \$8,989.01.

And the said appeal having been duly argued at the Court of Appeals and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from as aforesaid be affirmed without [fol. 130] costs, and having further ordered and adjudged that the proceedings herein be remitted to the Supreme Court there to be proceeded upon according to law; now on reading and filing the remittitur from the Court of Appeals herein now it is

Ordered that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter in Queens County.

E. L., J. S. C.

Granted Dec. 4, 1925. William E. Kelly, Clerk.

[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

Compared. Monroe and Berg.

[fol. 131] SIR: Please take notice that the within is a true copy of an order in the within entitled action, this day duly filed and entered with the Clerk of the within named court.

Dated New York Dec. 7, 1925.

Yours, &c., Macklin, Brown & Van Wyk. Office and Post Office address: 44 Beaver Street, Borough of Manhattan, New York City.

[fol. 132] IN SUPREME COURT OF NEW YORK

[Title omitted]

JUDGMENT—Filed December 7, 1925

A judgment in this action in favor of the plaintiff and against the defendant having been rendered in this court on the 6th day of March, 1925, and the defendant having appealed from the said judgment to the Appellate Division

of this court for the Second Department, and the plaintiff having appealed from that part of said judgment which limited the plaintiff's recovery in the sum of \$8,989.01 to the Appellate Division of this Court for the Second Department and the said judgment having been affirmed in all things, by this court at said Appellate Division and judgment of affirmance having been rendered thereon the 15th day of July, 1925 and the defendant having appealed therefrom to the Court of Appeals and the plaintiff having appealed from that part of said judgment which affirms that part of said judgment entered on March 6, 1925, which limited plaintiff's recovery to the sum of \$8,989.01; and the said Court of Appeals having sent hither its remittitur filed herein the 7th day of December, 1925, by which it appears that the said Court of Appeals has affirmed the said judgment, and has remitted the judgment from the said Court of Appeals to this Court to be enforced according to law and this court having by an order duly entered herein [fol. 133] the 7th day of December, 1925, ordered that said judgment be made the judgment of this court.

Adjudged that said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court.

Judgment signed and entered Dec. 7, 1925, at 11:59 a. m.

Edward W. Cox, Clerk. (Seal.)

[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

Compared. Monroe and Berg.

[fol. 133a] SIR: Please take notice that the within is a true copy of a judgment in the within entitled action, this day duly filed and entered with the Clerk of the within named court.

Dated New York Dec. 7, 1925.

Yours, &c., Macklin, Brown & Van Wyck. Office and Post Office address: 44 Beaver Street, Borough of Manhattan, New York City.

[fol. 134] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

PETITION FOR WRIT OF ERROR

To the Honorable Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York:

The petition of James Stewart & Company, a corporation of the State of New Jersey, respectfully shows:

I. Heretofore and on or about the 13th day of January, 1922, an action was commenced in the Supreme Court of the State of New York, for the County of Queens, by Dominick Rivara, plaintiff, against James Stewart & Company and James Stewart & Company, Inc., defendants.

The litigation arose out of a contract, entered into at New York, N. Y., on the 17th day of April, 1919, for the [fol. 135] conditional sale of the Tug "James B. Stewart," to Rivara by James Stewart & Company, Inc., for \$32,500, which Rivara agreed to pay in installments, with the condition that title to the tug should not pass to Rivara until all installments be paid. James Stewart & Company, Inc., a corporation of the State of New York, acted in the sale as agent for James Stewart & Company, a New Jersey Corporation as aforesaid.

The contract of sale provided in case of default by Rivara, that James Stewart & Company, Inc., should have the right to re-enter and take possession of the tug and that in such event all payments made on the purchase price should be applied solely as rental, Rivara waiving any and all claims that he might have to the tug.

The tug was delivered to Rivara on the 17th day of April, 1919. He operated her in interstate and intrastate commerce until the 27th day of October, 1920, when he defaulted in payments. Thereupon James Stewart & Company, took admiralty proceedings by libel for possession of the tug and obtained possession by a decree of the United States District Court for the Southern District of New York, dated the 7th day of April, 1921.

At all the times mentioned, the Tug "James B. Stewart" was documented by its owner, James Stewart & Company, [fol. 136] in the Custom House at the port of New York,

under the laws of the United States, as a vessel of the United States, and was duly entitled under the laws of the United States for coasting voyages between ports of the United States.

After recovery of the tug by James Stewart & Company, Rivara did not redeem the tug or make good his default and James Stewart & Company, did not sell the tug at public auction.

II. In the said complaint, Rivara sued to recover the total amount of payments made on the purchase price of the tug.

It is alleged in the complaint that the Personal Property Laws of the State of New York relating to conditional sales became a part of the agreement; that, though Rivara did not make good his default nor redeem the tug after James Stewart & Company took possession, James Stewart & Company, upon the expiration of thirty days after obtaining possession, did not give Rivara any notice of the sale of the tug at auction or otherwise and failed to sell the tug within thirty days thereafter, as required by Laws 1909, Chapter 41, of the State of New York, which provide as follows:

[fol. 137] Sec. 65. Sale of Property Retaken by Vendor. Whenever articles are sold upon the condition that the title thereto shall remain in the vendor, or in some other person than the vendee, until the payment of the purchase price, or until the occurrence of a future event or contingency, and the same are retaken by the vendor or his successor in interest, they shall be retained for a period of thirty days from the time of such retaking, and during such period the vendee or his successor in interest may comply with the terms of such contract, and thereupon receive such property. After the expiration of such period, if such terms are not complied with, the vendor, or his successor in interest, may cause such articles to be sold at public auction. Unless such articles are so sold within thirty days after the expiration of such period, the vendee or his successor in interest may recover of the vendor the amount paid on such articles by such vendee or his successor in interest under the contract for the conditional sale thereof.

Sec. 66. Notice of Sale. Not less than fifteen days before such sale, a printed or written notice shall be served

personally upon the vendee, or his successor in interest, if he is within the county where the sale is to be held; and if not within such county, or he cannot be found therein, such notice must be mailed to him at his last known place of residence.

In its answer James Stewart & Company alleged that, as the Tug "James B. Stewart" was duly enrolled in the Custom House in the Southern District of New York in accordance with the Federal Act of June 29, 1850, U. S. R. S. 4192, the Laws of the State of New York relating to conditional sales did not apply in any respect to the aforesaid contract of sale, nor form a part thereof. James Stewart & Company counterclaimed for certain repairs and supplies to the tug, and insurance premiums for insurance on the tug, which Rivara had contracted to pay under the said agreement.

[fol. 138] III. The issues raised by the pleadings came on for trial on the 3rd day of February, 1925, before Mr. Justice Faber of the Supreme Court of the State of New York at a Trial Term thereof, held in the County of Queens, a jury trial being waived. The court held that the laws of the State of New York relating to conditional sales applied to the contract of sale of the tug and that, as applied, said laws were not repugnant to the Constitution and laws of the United States. The court held that as James Stewart & Company had not complied with said Laws Rivara was entitled to recover the money paid on the purchase price of the tug. James Stewart & Company was allowed its counterclaims. Accordingly, a judgment against James Stewart & Company, the owner of said tug, in the sum of \$8,989.01 was entered in the office of the Clerk of the County of Queens on the 6th day of March, 1925.

IV. Thereupon James Stewart & Company duly excepted to the decision of said justice and duly appealed from said judgment to the Appellate Division of the Supreme Court of the State of New York for the Second Department.

The appeal having come on for argument was heard before the said Appellate Division, by which, on or about the 5th day of June, 1925, an order of affirmance was entered in the office of the Clerk of said Appellate Division as resettled by an order dated the 12th day of June, 1925.

[fol. 139] Judgment of affirmance was accordingly entered in the office of said Clerk for the County of Queens on the 15th day of July, 1925.

V. Thereupon James Stewart & Company appealed from said judgment entered on the affirmance by the Appellate Division to the Court of Appeals, which is the highest court of the State of New York. Said appeal to said Court of Appeals was taken by virtue of the law of the State of New York, as set forth in the first clause of Section 588, subdivision 1, of the Civil Practice Act which allows an appeal as of right,

"from a judgment or order entered upon the decision of an Appellate Division of the Supreme Court which finally determines an action or special proceeding where is directly involved the construction of the Constitution of the State or of the United States."

The appeal duly came on for argument before said Court of Appeals, which, on the 24th day of November, 1925, affirmed said judgment by an order entered on said date in the office of the Clerk of said Court of Appeals, in pursuance of an opinion rendered on that date by said Court of Appeals, Justice Cardozo writing. A certified copy of this opinion is annexed hereto and made a part hereof. The remittitur from said Court of Appeals was duly sent to the Supreme Court for the County of Queens, and on the 7th day of December, 1925, the order and judgment of said [fol. 140] Court of Appeals was entered in the office of said clerk.

Wherefore petitioner prays that a Writ of Error may issue from the Supreme Court of the United States to the Supreme Court of the State of New York under the provisions of Section 237 of the Act of February 13, 1925, to amend the judicial code and to further define the jurisdiction of the Circuit Court of Appeals and of the Supreme Court of the United States and for other purposes, on the ground that the decision of the New York Court of Appeals was a decision in which the validity of a statute of the States of New York was drawn in question on the ground that it was repugnant to the Constitution and Laws of the United States and the decision was in favor of the validity

of the New York State statute, and that petitioner may be allowed to take up for review before the Supreme Court of the United States, the said order and judgment of said Court of Appeals of the State of New York, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the said Supreme Court of the United States, and that your petitioner may have such other and further relief in the premises as may be just, and your petitioner will ever pray, etc.

Harrington Putnam, John M. Woolsey, Attorneys
for James Stewart & Company, Petitioner.

Office and P. O. address: 27 William Street, Borough of Manhattan, City and State of New York.

[fol. 141] *Duly sworn to by Wm. A. Rowan. Jurat omitted in printing.*

[fol. 142] Reporter's certificate to foregoing paper omitted in printing.

Judge's certificate to clerk and reporter omitted in printing.

[fol. 143] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

(Decided November 24, 1925)

Cross-appeals, by permission, from a judgment of the Appellate Division of the Supreme Court in the Second Judicial Department affirming a judgment entered upon a decision of the trial term, a jury having been waived.

OPINION—Filed January 27, 1926

CARDOZO, J.:

Plaintiff bought from defendant a tug-boat, the James B. Stewart, under a contract of conditional sale. Payments aggregating \$23,518.87 were made from time to time upon account of the price. As to later installments, the buyer

made default. Following such default, the defendant resumed possession. It failed, however, to comply with section 65 of the Personal Property Law (L. 1909, ch. 45; now §79, L. 1922, ch. 642 [Cons. Laws, ch. 4]). That section provides in substance that when goods and chattels are retaken by a conditional vendor, they shall be held for thirty days, during which time the vendee may redeem. If he does not redeem, the vendor may sell at public auction. Unless he does this within the time prescribed, "the vendee * * * may recover of the vendor the amount paid on such articles by such vendee * * * under the contract for the conditional sale thereof."

Plaintiff, invoking the statute, brings this action to recover \$23,518.87, with interest, the installments of the purchase price. Defendant counterclaims for moneys paid by it for insurance and repairs, which under the terms of the contract should have been paid by the buyer. Both parties appeal. The seller is dissatisfied because the buyer has been reimbursed for part payments of the price. The buyer is dissatisfied because the reimbursement has been reduced by the allowance of the counterclaim.

The seller argues that a conditional sale of vessels is not one of goods and chattels within the purview of the statute (Pers. Prop. Law, §§ 60, 65). Authoritative precedents commit us to a different ruling. We held in *Horton v. Davis* (26 N. Y. 495, 497, decided in 1863) that under the act of 1833 (L. 1833, ch. 279) a mortgage on a vessel is a mortgage on a chattel. We were advised by later judgments of the United States Supreme Court that the act in some of its requirements must yield to an act of Congress which covered the same field (*White's Bank v. Smith* [1868] [fol. 144] 7 Wall. 646; *Aldrich v. Aetna Co.*, [1869] 8 Wall. 491; reversing, 26 N. Y. 92). Congress had said that "no bill of sale, mortgage, hypothecation or conveyance of any vessel or part of any vessel of the United States" should "be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof," unless the instrument was recorded in the office of the Collector of Customs where such vessel was registered and enrolled (Act of June 29, 1850; U. S. Rev. Stat. § 4192). The States could not add to these exceptions in respect of enrolled vessels by a requirement that

mortgages to be valid as to third parties must also be recorded elsewhere. The Supreme Court did not deny that a mortgage on a vessel was within the terms of the State statute. Upon any question of construction, the judgment of the State court was to be accepted as conclusive. The reversal was based upon considerations of defect of power.

The question of construction came to us again in 1874, and we decided it as we had done before (*Best v. Staple*, 61 N. Y. 71, 76). We held that the ruling of the Supreme Court was confined to vessels enrolled and registered as vessels of the United States. If the vessel was not so enrolled and registered, the local act was to be followed. In so holding, we held again that a mortgage on a vessel was a mortgage on a chattel. The ruling then made has been unquestioned ever since (cf. *Witherbee v. Taft*, 51 App. Div. 87; *The Independence*, 9 Ben. 395).

The Chattel Mortgage Act is cognate to the act for the regulation of conditional sales. A vessel, if a chattel within the one, is plainly a chattel within the other. We can think of no distinction that would not condemn itself as arbitrary. Indeed, the definitions of the Sales Act instead of weakening the holding under the mortgage act, tend to reinforce it. "'Goods,'" we are there told, "include all chattels personal other than things in action and money" (Pers. Prop. Law, § 156; cf. § 61, L. 1922, ch. 642). A vessel is not within the exception of "things in action and money." It is either a chattel personal, or else there must be a tertium quid which the statute does not classify. The description may seem inept in its application to an ocean liner. We are to remember that a vessel may be a motor boat or a skiff. Without more elaboration, we think the question is no longer open. The content of the statute may have been doubtful once. It is now settled by authority.

The seller argues that thus construed, the statute encroaches upon fields already occupied by Congress in the exercise of national power. The tugboat was enrolled and registered in the office of the Collector of Customs. After the conditional sale, it was used in interstate commerce, though whether it had been so used before that time the [fol. 145] record does not tell us. Congress has said that bills of sale, conveyances and mortgages shall be invalid against purchasers without notice unless recorded in a cer-

tain place. The provisions of Personal Property Law (§§ 62 and 63) are invalid, it is said, when they prescribe other forms of record for contracts of conditional sale. We pass over the question whether contracts of conditional sale are to be so identified with bills of sale as to lead to a holding that State regulation of the one subject is excluded by national regulation of the other (cf. *The Oceana*, 233 Fed. Rep. 139, 143; 244 id. 80, 83). Even if such identity be assumed, the defendant does not gain by the assumption. The provisions of Personal Property Law (§§ 62 and 63) are without importance except where the rights of third persons, not parties to the contract, are involved. Between the parties themselves, the contract of conditional sale is valid though it is not filed anywhere, nor even put in writing. If a controversy shall some day arise in which a mortgagee or buyer from a conditional vendee shall invoke sections 62 and 63 of the statute against a conditional vendor, the question will have to be determined whether those sections in their application to vessels of the United States are in conflict with the act of Congress. No question of the effect of a record or the lack of it in any public office, State or National, is before us at this time. What concerns us now is section 65, which fixes the implied terms of the contract between the parties to the sale. Its underlying thought is that a conditional vendor shall be made to do the fair thing by his conditional vendee. To avoid hardship and oppression, he must either put up for sale the retaken chattels, and give credit for the proceeds, or restore the payments made to him. He knows when he enters into the contract of conditional sale that this obligation is attached to it, and he must be taken to have contemplated performance as much as if the obligation had been stated in the writing. In effect, a conditional sale is assimilated to a mortgage (2 Williston on Sales, § 579, at p. 1427). We find nothing in any act of Congress that pre-empts this field of regulation or even touches it remotely (*The J. E. Rumbell*, 148 U. S. 1, 16). The contract is not maritime (*Bogart v. S. S. John Jay*, 17 How. [U. S.] 399, 401, 402; *The Ada*, 250 Fed. Rep. 194, 198). The regulation of its incidents does not involve interference, unless indeed the most remote and indirect, with interstate commerce (*Heisler v. Thomas Colliery Co.*, 260 U. S. 245; *Langston Monotype*

Machine Co. v. Curtis, 224 Fed. Rep. 403). The standards of conceivable conduct are established by the State for those contracting within its borders. The defendant argues that sale at public auction will be an inadequate test of value, for the buyer will take subject to maritime liens [fol. 146] which may be secret and unknown (Piedmont & Georges Creek Coal Co. v. Seaboard Fisheries Co., 254 U. S. 1, 12; Moran v. Sturges, 154 U. S. 256). This may supply a reason why the Legislature should have excepted vessels from the operation of the statute. It is not a reason why the exception should be established by the courts. Statutes are not invalid for failure to cure completely the ills they aim to remedy.

This case was before us on an earlier appeal, and questions were then certified to bring up an intermediate order (236 N. Y. 601). The questions certified were these:

"1. Do the provisions of sections 63, 65 and 66 of the Personal Property Law of the State of New York (Consol. Laws, ch. 41) apply to ships and vessels enrolled in a United States Customs House?

2. Did the New York Legislature have power to require the filing with local officials, such as registers and county clerks, of contracts for conditional sale of vessels enrolled in a United States Customs House?

3. Does the complaint herein state facts sufficient to constitute a cause of action?"

We answered the third question "yes," though without opinion, and did not answer the others. We could not have upheld the complaint without construing section 65 of the statute and applying it to vessels. The decision then made became the law of the case. We have been moved by the earnest and able argument of defendant's counsel to state in an opinion the reasons that controlled our judgment when the case was here before.

The plaintiff's appeal brings up the allowance of the counterclaim. The seller has had judgment for the cost of insurance premiums and repairs which should have been paid for by the buyers. The plaintiff argues that this is forbidden by section 65 which gives the buyer restitution for "the amount paid on such articles * * * under the

contract for the conditional sale thereof." We read the statute otherwise. In providing for the recovery of payments on the subject of the sale, the statute has in view the payments made by the buyer as installments of the purchase price. It has no bearing on payments unrelated to the price, though the obligation to make them is expressed in the same contract. If the plaintiff himself had caused the tug to be repaired or procured the policies of insurance, he would have no remedy against the defendant for expenses thus incurred. His position is no better when sued by the defendant for payments made in his behalf.

The judgment should be affirmed without costs to either party.

Hiscock, Ch. J., Pound, McLaughlin, Crane, Andrews and Lehman, JJ., concur.

Judgment affirmed.

[File endorsement omitted.]

Compared. Thom and Maher.

Clerk's certificate to foregoing opinion & petition omitted in printing.

[fol. 146a] [Endorsed:] Petition for writ of error. Copy received Jan. 15, 1926. Machlin, Brown, Van Wyck, attys. for deft. in error.

[fol. 147] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ASSIGNMENTS OF ERROR—Filed January 27, 1926

And now comes James Stewart & Company, plaintiff in error, and in connection with its application for a Writ of Error, makes and files its assignment of errors.

I. The Court of Appeals of the State of New York, in deciding that Sections 65 and 66 of the Personal Property Law of the State of New York—Laws 1909, Ch. 45;—as applied to the conditional sale of the Tug "James B. Stewart," were not unconstitutional, erred in that the

statutes so applied constitute a regulation of, and a burden upon, commerce among the several states in violation of Article I, Section 8, of the Constitution of the United States and laws of the United States enacted thereunder, whereby was drawn in question the validity of, or an authority exercised under, statutes of the State of New York, on the ground of their being repugnant to the Constitution and [fol. 148] laws of the United States, and the decision is in favor of their validity; and wherein a right, privilege or immunity was specially set up and claimed by plaintiff in error under the Constitution and statutes of the United States, and the decision is against the right, privilege or immunity set up and claimed under said Constitution and statutes.

II. The Court of Appeals, in deciding that such sections of the Personal Property Law of the State of New York—Laws 1909, Ch. 45—as applied to the conditional sale of the Tug "James B. Stewart" were not unconstitutional, erred in that the statutes so applied conflict with, and are in violation of, The Act of June 29, 1850, entitled "An Act to Provide for Recording Conveyances of Vessels and for other purposes" (now U. S. Rev. Stat. 4192), of the laws of the United States, whereby was drawn in question the validity of, or an authority exercised under, statutes of the State of New York, on the ground of their being repugnant to the Constitution and laws of the United States, and the power of Congress to fix and determine matters under the general maritime law and the decision is in favor of their validity; and wherein a right, privilege or immunity was specially set up and claimed by plaintiff in error under the Constitution and statutes of the United States, and the decision is against the right, privilege or immunity set up and claimed under said Constitution and statutes.

[fol. 149] III. The Court of Appeals in deciding that the Personal Property Law of the State of New York—Laws 1909, Ch. 45—as applied to the conditional sale of the tug "James B. Stewart," were not unconstitutional, erred in that the statutes, so applied, infringe on the exclusive admiralty and maritime jurisdiction of the United States in violation of Article III, Section 2, of the Constitution

of the United States and laws of the United States enacted thereunder, and such application of the State Statutes contravenes the essential purposes of acts of Congress and works material prejudice to the characteristic features of the admiralty law in the proper harmony and uniformity of that law in interstate relations, whereby was drawn in question the validity of or an authority exercised under statutes of the State of New York, on the ground of their being repugnant to the Constitution or Laws of the United States, and the decision is in favor of their validity; and wherein a right, privilege or immunity was claimed by plaintiff in error under the Constitution or statutes of the United States, and the decision is against the right, privilege or immunity set up and claimed under said Constitution and statutes.

IV. The Court of Appeals erred in not rendering judgment in favor of plaintiff in error, because said Personal Property Law of the State of New York—Laws 1909, Ch. 45 [fols. 150 & 150a] —as applied to the conditional sale of the Tug “James B. Stewart” and as applied to plaintiff in error, are unconstitutional and void and in conflict with, and in violation of, Article I, Section 8 and Article III, Section 2 of the Constitution of the United States and in conflict with the Act of June 29, 1850, entitled “An Act to Provide for Recording Conveyances of Vessels and for other purposes” (U. S. Rev. Stat. 4192), of the laws of the United States, whereby was drawn in question the validity of, or an authority exercised under Statutes of the State of New York, on the ground of their being repugnant to the Constitution and laws of the United States, and the decision is in favor of their validity; and wherein a right, privilege or immunity was specially set up and claimed by plaintiff in error under the Constitution and statutes of the United States, and the decision is against the right, privilege or immunity set up and claim under said Constitution and statutes.

Harrington Putnam, John M. Woolsey, Attorneys for James Stewart & Company, Plaintiff in Error.

Office and P. O. Address: 27 William Street, Borough of Manhattan, City and State of New York.

Read on application for writ of error the 13 day of January, 1926.

Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York.

[File endorsement omitted.]

Compared. Thom and Maher.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 151] IN COURT OF APPEALS OF NEW YORK

[Title omitted]

ORDER ALLOWING WRIT OF ERROR—Filed January 27, 1926

The above entitled matter coming on to be heard, on the petition of James Stewart & Company, for a writ of error from the Supreme Court of the United States to the Supreme Court of the State of New York, County of Queens, and upon the examination of the petition the assignment of errors and the record in said matter, and desiring to give petitioner an opportunity to present to the Supreme Court of the United States the questions presented by the record in said matter, and a bond having been furnished by plaintiff in error conditioned according to law in the sum of Five hundred \$500.00) dollars; now therefore it is

Ordered that a writ of error be and the same is hereby [fols. 152 & 152a] allowed from the Supreme Court of the United States to the Supreme Court of the State of New York, County of Queens, and that said writ of error and citation thereon be issued and served according to law and that a true copy of the record, assignment of errors and all proceedings in this cause be transmitted to the Supreme Court of the United States, duly certified according to law in order that the Supreme Court of the United States may

inspect the same and take such action thereon as it may deem proper.

Dated Albany, New York, the 13 day of January, 1926.

Frank H. Hiscock, Chief Judge of the Court of Appeals of the State of New York.

[File endorsement omitted.]

Compared. Maher and Thom.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 153] IN COURT OF APPEALS OF NEW YORK

WRIT OF ERROR

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of New York, County of Queens, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the Supreme Court of the State of New York, County of Queens on a remittitur from the Court of Appeals of the State of New York, before you or some of you, being the highest court of Law or Equity of said State in which a decision could be had in the said suit between Dominick Rivara, plaintiff, and James Stewart & Company, defendant, wherein was drawn in question the validity of, or an authority exercised under Statutes of said State, on the ground of their being repugnant to the Constitution, and laws of the United States, and the decision is in favor of their validity; or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission; a manifest error has [fol. 154] happened to the great damage of the said James Stewart & Company as appears by its complaint. We, being willing that error, if any has been, should be duly cor-

13. Plaintiff's notice of appeal to Appellate Division.
14. Opinion of Appellate Division.
15. Order of affirmance.
16. Order of re-settlement of order of affirmance.
17. Judgment of affirmance.
18. Order granting defendant leave to appeal to the Court of Appeals.
19. Defendant's notice of appeal to the Court of Appeals.
20. Order granting leave to plaintiff to appeal to Court of Appeals.
21. Plaintiff's notice of appeal to Court of Appeals.
22. Order of remittitur from the Court of Appeals.

[fol. 161] II. The order on remittitur entered in the Supreme Court of Queens County.

III. The judgment on remittitur entered in the Supreme Court of Queens County.

IV. The petition for writ of error, annexed to which is copy of opinion of the Court of Appeals.

V. The assignment of errors.

VI. The order allowing writ of error.

VII. The original writ of error.

VIII. The original citation.

IX. The bond on writ of error, \$500.

X. Copy of this stipulation as to record.

Dated New York, February 3, 1926.

Harrington Putnam, John M. Woolsey, Attorneys for Plaintiff in Error. Pierce M. Brown, Attorney for Defendant in Error.

Clerk's certificate to foregoing paper omitted in printing.

[fol. 162] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 163] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION
BY PLAINTIFF IN ERROR OF PARTS OF THE RECORD TO BE
PRINTED, WITH PROOF OF SERVICE—Filed February 8, 1926

And now comes James Stewart & Company, plaintiff in error, and states that it intends to rely upon the following points in prosecution of the writ of error herein and will contend:

I. That the Court of Appeals and the Supreme Court of the State of New York, in deciding herein that Sections 65 and 66 of the Personal Property Law of the State of New York—Laws 1909, Ch. 45;—as applied to the conditional sale of the Tug “James B. Stewart,” were not unconstitutional, erred in that the statutes, so applied, constitute a regulation of, and a burden upon, commerce among the several states in violation of Article I, Section 8, of the Constitution of the United States and laws of the United States enacted thereunder.

[fol. 164] II. That the Court of Appeals and the other Courts of New York State, in deciding herein that such sections of the Personal Property Law of the State of New York—Laws 1909, Ch. 45—as applied to the conditional sale of the Tug “James B. Stewart” were not unconstitutional, erred in that the statutes so applied conflict with, and are in violation of laws of the United States namely, The Act of June 29, 1850, entitled “An Act to Provide for Recording Conveyances of Vessels and for other purposes” now U. S. Rev. Stat. 4192.

III. That the Court of Appeals and the Supreme Court of New York State in deciding herein that the Personal Property Law of the State of New York—Laws 1909, Ch. 45—as applied to the conditional sale of the tug “James B. Stewart,” were not unconstitutional, erred in that the statutes, so applied, infringe on the exclusive admiralty and maritime jurisdiction of the United States in violation of Article III, Section 2, of the Constitution of the United States and laws of the United States enacted thereunder, and such application of the State Statutes contravenes the essential purposes of acts of Congress and works material

prejudice to the characteristic features of the admiralty [fol. 165] law in the proper harmony and uniformity of that law in interstate relations.

IV. That the Court of Appeals and the Supreme Court of the State of New York erred in not rendering judgment in favor of plaintiff in error, herein, because said Personal Property Law of the State of New York—Laws 1909, Ch. 45—as applied to the conditional sale of the Tug “James B. Stewart” and as applied to plaintiff in error, is unconstitutional and void and in conflict with, and in violation of, Article I, Section 8 and Article III, Section 2 of the Constitution of the United States and also in conflict with the Laws of the United States, namely the Act of June 29, 1850, entitled “An Act to Provide for Recording Conveyances of Vessels and for other purposes” U. S. Rev. Stat. 4192.

V. That by Acts of Congress the Federal Government has permitted the creation under certain conditions by the authority of the Commerce Clause of a special kind of personal property, which has been, so to speak, federalized. This new special form of property is known as “vessels of the United States,” which are required by Act of Congress to be documented in a Custom House of the United States. [fol. 166] Consequently, the Personal Property Law of the State of New York should not have been held to affect a “vessel of the United States” properly documented in the proper Custom House, because so to hold is an invasion of a zone already occupied by Federal legislation and an interference with a special form of property created by Congress as to which a State statute should not be held to have any application.

VI. That in 1900, when the New York Personal Property Law was amended to require an auction sale of articles retaken by the vendor—Laws of 1900, Chapter 762—it had long been settled that the United States statute for recording instrument of title of “vessels of the United States” controlled and superseded all State legislation on this subject.

VII. That statutes similar in their general effect to Sections 65 and 66 of the New York Personal Property law have been passed in other States but have hitherto not been applied to documented vessels, but, if so applied, it would

not only, as above pointed out, be an improper interference with Federal Powers under the Commerce Clause but it would destroy the uniformity of the Admiralty and Maritime law as applied to vessel property throughout the United States.

VIII. That Section 65 of the New York Personal Property Law requires that the articles re-taken by the vendor be retained for thirty days "during which the vendee may comply with the terms of such contract and thereupon receive such property."

That this provision would tie up a vessel, possibly a large ocean steamship, while awaiting payment from a defaulting buyer;

That after this thirty days, there are to be fifteen days' notice of sale; that, therefore, Sections 65 and 66 of the New York Personal Property Law would keep a re-taken vessel idle for forty-five days incurring the expense of wharfage and charges of watchmen;

That this would not only constitute a violation of the ancient principle "that ships are built to ply the seas and not to rot by the wharves," but would also constitute a very serious interference with "vessels of the United States" which might be sold conditionally under such contracts as in this case, and that such a construction of the New York Personal Property Law constitutes a serious interference with commerce and with the uniformity of the admiralty and maritime law which, as this Court has often said, must be uniform throughout the United States.

IX. That a sale under a State Act of this kind would not give a good title to a vessel and that, therefore, the purchaser of a vessel sold by auction under such a State statute would not be willing to give a fair price for the vessel, because if he purchased the vessel, it would be subject to unknown maritime liens not only in the ports of the United States, but, if the vessel was engaged in foreign commerce, she would also be subject to proceedings in any admiralty or maritime Court of any foreign port at which she might touch; "vessels of the United States" should not be subject to such possible infirmities of title.

X. That a State legislature is not allowed to invade a constitutional field of Federal legislation which has already

been occupied by Congress or to endeavor to supplement such Federal legislation.

XI. That the Courts below erred in applying the "admiralty jurisdiction" test which it invoked for that is a question of the jurisdiction of a particular Court, whilst here we have involved a question of general constitutional law.

[fol. 169] XII. That even if the wording of the statute were doubtful, under well settled principles it should be held to apply only to property properly under the authority of State legislation and a "vessel of the United States" which is a creature of Congressional legislation is not such form of property.

XIII. That as the records of sales or conveyances of vessels of the United States are solely regulated by the laws of Congress and as the titles are recorded in the appropriate Custom Houses of the United States there is always a place for anyone dealing with a vessel to go in order to find out who her owner is, and, hence, it is impossible to misconstrue possession as being ownership.

XIV. That the Court of Appeals and the Supreme Court of New York State erred in not rendering judgment in favor of the plaintiff in error—defendant below—whereby the complaint would have been dismissed and the plaintiff in error—defendant below—would have had judgment in full for its counter claims against plaintiff below.

Plaintiff in error further states that the entire record as certified to the clerk of this Honorable Court is necessary for the proper consideration of this writ of error, for [fol. 170] the reason that the case involves the striking of a balance between the claim of the plaintiff below and the claim of the defendant below and unless the full record is before the Court the basis under which the judgment below was arrived at will not be patent to the Court.

Harrington Putnam, John M. Woolsey, Attorneys
for James Stewart & Company, Plaintiff in Error.

Office and Post Office address: 27 William Street, Borough of Manhattan, City of New York, State of New York.

[fol. 171] Copy received February 6, 1926. Macklin, Brown, Van Wyk. Pierce M. Brown.

[fol. 172] To the Honorable the Supreme Court of the United States:

And now comes James Stewart & Company, plaintiff in error, and prays for a reversal of the judgment of the Supreme Court of the State of New York in the action brought by Dominick Rivara against James Stewart & Company and James Stewart & Company, Inc., which judgment was entered in the office of the Clerk of the County of Queens on the 6th day of March, 1925; and it also prays for a reversal of the judgment of affirmance entered in the office of said clerk on the 15th day of July, 1925, upon an order of affirmance of the Appellate Division of the Supreme Court for the Second Department, entered in the office of the clerk of said Appellate Division on the 12th [fol. 173 & 174] day of June 1925; and it also prays for reversal of the judgment of affirmance entered in the office of said clerk on the 7th day of December, 1925, upon an order of affirmance of the Court of Appeals of the State of New York, entered in the office of the clerk of said Court of Appeals on the 24th day of November, 1925.

Harrington Putnam, John M. Woolsey, Attorneys for James Stewart & Company, Plaintiff in Error.

Office & P. O. address: 27 William Street, Borough of Manhattan, City and State of New York.

[fol. 175] [File endorsement omitted.]

Endorsed on cover File No. 31,678. New York Supreme Court. Term No. 955. James Stewart & Company, plaintiff in error, vs. Dominick Rivara. Filed February 5th, 1926. File No. 31,678.

**MOTION
TO
DISMISS
OR
AFFIRM**

I N D E X .

	PAGE
STATEMENT.	
NEW YORK STATUTE INVOLVED.....	1
NATURE OF THE LITIGATION.....	2
RESULT IN THE NEW YORK COURT OF APPEALS.....	4
TUG IN QUESTION A VESSEL OF THE UNITED STATES.....	5
FINDINGS OF THE TRIAL JUDGE.....	6
EXCEPTIONS OF DEFENDANT JAMES STEWART & Co.	8
PLAINTIFF'S EXCEPTIONS.....	8
PLAINTIFF'S-IN-ERROR ARGUMENT AND POINTS TO BE RELIED ON.....	8
 FIRST POINT:	
THE RECORDS OF SALES OR CONVEYANCES OF VESSELS OF THE UNITED STATES ARE SOLELY REGULATED BY THE LAWS OF CONGRESS, AND THE CREATION OF THIS FORM OF PROPERTY, KNOWN AS "VESSELS OF THE UNITED STATES", BY CONGRESS FEDERALIZED SUCH PROPERTY AND BROUGHT IT WITHIN THE EXCLUSIVE DOMAIN OF INTERSTATE COMMERCE.....	14
 SECOND POINT:	
THE RESULT OF THE DECISION OF THE NEW YORK COURT OF APPEALS AS TO THE EFFECT OF THE NEW YORK PERSONAL PROPERTY LAW ON VESSELS OF THE UNITED STATES IS AN INTERFERENCE WITH INTERSTATE COMMERCE BECAUSE IT WITHDRAWS THE VESSEL FROM COMMERCE FOR A PERIOD OF UPWARDS OF THIRTY AND POSSIBLY SIXTY DAYS, DURING WHICH PERIOD IT INTERFERES WITH THE UNIFORM ENFORCEMENT OF ADMIRALTY LAW IN THAT IT INTERFERES WITH THE ENFORCEMENT OF MARITIME LIENS AGAINST THE VESSEL DURING THAT PERIOD.....	20

THIRD POINT:

THE COURT OF APPEALS SEEMS TO HAVE BEEN MISLED BY THE RULING OF THE COURT AT SPECIAL TERM IN THE ADMIRALTY JURISDICTION TEST WHICH IT MISAPPLIED.....

23

FOURTH POINT:

THE NEW YORK PERSONAL PROPERTY LAW WAS NOT INTENDED TO, AND CONSTITUTIONALLY CANNOT, AFFECT VESSELS OF THE UNITED STATES DOCUMENTED IN THE UNITED STATES CUSTOM HOUSE

27

LAST POINT:

THE MOTION TO DISMISS OR AFFIRM SHOULD BE DENIED, AND THE CASE SHOULD NOT BE PUT ON THE SUMMARY DOCKET FOR THE REASON THAT THE ISSUES INVOLVED ARE TOO IMPORTANT TO BE DEALT WITH ON THAT DOCKET.....

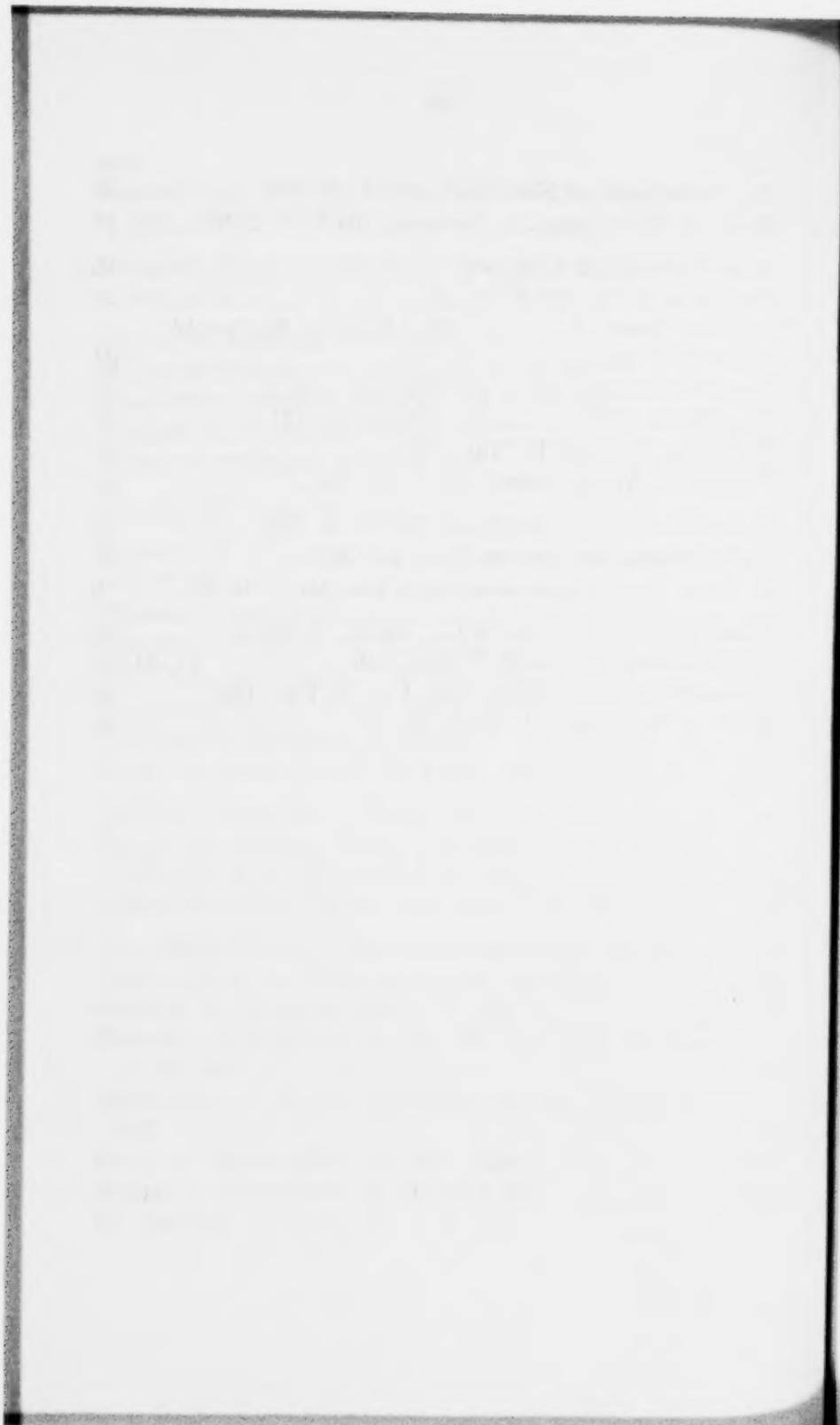
44

INDEX OF CASES.

	PAGE
<i>The Ada</i> , 250 Fed. Rep. 194.....	22, 24
Aetna Co. vs. Aldrich, 26 N. Y. 92; Reversed 8 Wall. 491	38, 39
Aguirre vs. Maxwell, 3 Blatch., 140; 1 Fed. Cases 212	34
Aldrich vs. Aetna Ins. Co., 8 Wall. 491.....	38, 39
Bissel vs. Hopkins, 3 Cowen 166.....	28
Bogart vs. S. S. John Jay, 17 How. (U. S.) 399.....	22
Borden vs. Enterprise Co., 198 Mass. 590.....	43
Brown vs. Duchesne, 19 Howard 183.....	36
Burpee vs. Sparhawk, 97 Mass. 342.....	33
Chelentis vs. Luckenbach S. S. Co., Inc., 247 U. S. 372	19
<i>The Conqueror</i> , 166 U. S. 110.....	34
Coombs vs. Beaumont, 5 B. & Ad. 72.....	30
<i>The Eagle</i> , 8 Wall. 15.....	25
Folger vs. Weber, 16 Hun (23 N. Y. Sup. Ct.) 512....	39
<i>The Genesee Chief</i> , 12 Howard 443.....	25
Gibbons vs. Ogden, 9 Wheaton 1.....	26, 33
Grant Smith Porter Ship Co. vs. Rhode, Sup. Ct. Repr. Ad. Op. Feb. 1, 1922, p. 157 [257 U. S. 469]	24
Gray vs. Taylor, 227 U. S. 51.....	43
Harrison Supply Co. vs. United States, 171 Fed. 406	35
Heisler vs. Thomas Colliery Co., 260 U. S. 245.....	22
Hill vs. The Golden Gate, Newbury Rep. 309; Fed. Cases No. 6492.....	17
Hooper vs. Gumm, L. R. 2 Chan. 282.....	31
<i>J. E. Rumbell</i> , 148 U. S. 1.....	22
<i>J. G. Stevens</i> , 170 U. S. 113.....	41, 42

	PAGE
Kansas City Railway Co. <i>vs.</i> Kaw Valley Drainage Dist., 233 U. S. 75.....	18
Langston Monotype Machine Co. <i>vs.</i> Curtis, 224 Fed. Rep. 403	22
Manro <i>vs.</i> Almeida, 10 Wheaton 473.....	33
Matter of Emerson <i>vs.</i> Buck, 230 N. Y. 380.....	43
Missouri <i>vs.</i> Kansas Gas Co., 265 U. S. 298.....	18
Mitchell <i>vs.</i> Steelman, 8 Cal. 363.....	38, 39
Moran <i>vs.</i> Sturges, 154 U. S. 256.....	43
Oceana, 233 Fed. 139.....	40
Palmer's Shipbuilding Co. <i>vs.</i> Chaytor (1869) 4 L. R. C. B. 209.....	35
Panama Railroad Co. <i>vs.</i> Johnson, 264 U. S. 375.....	19
Parish <i>vs.</i> Wheeler, 22 N. Y. 494.....	30
The Passenger Cases, 7 Howard 283.....	33
People <i>vs.</i> Erie R. R. Co., 233 U. S. 671.....	15
Perkins <i>vs.</i> Emerson, 59 Maine 319.....	39
Prigg <i>vs.</i> Pennsylvania, 16 Peters 539.....	14
Railroad Company <i>vs.</i> Husen, 95 U. S. 465.....	18
Rivara <i>vs.</i> Stewart & Co., 119 Misc. 73; 204 A. D. 890; 236 N. Y. 601; 241 N. Y. 259.....	4
Robins Dry Dock Co. <i>vs.</i> Dahl, 266 U. S. 449.....	19
<i>The Sailor Prince</i> , 2 Ben. 234; Fed. Cases, 12218.....	42
Scharrenberg <i>vs.</i> Dollar S. S. Co., 245 U. S. 122.....	36
Schmidt <i>vs.</i> Simpson, 204 N. Y. 434.....	28
Schuede <i>vs.</i> Zenith S. S. Co., 216 Fed. 566, aff. 244 U. S. 646.....	18
Shannahan <i>vs.</i> Empire Engineering Corp., 204 N. Y. 543	36
Shaw <i>vs.</i> McCandless, 36 Miss. 296.....	38
Sinnot <i>vs.</i> Davenport, 22 Howard 227.....	38
So. Railway <i>vs.</i> Reid, 222 U. S. 444.....	15

	PAGE
Ex Parte State of New York, 256 U. S. 490.....	19
State of Washington <i>vs.</i> Dawson, 264 U. S. 219.....	19
In re Taylor, 232 U. S. 363.....	15
Taylor <i>vs.</i> U. S., 207 U. S. 120.....	36
Thames Towboat Co. <i>vs.</i> <i>The Francis McDonald</i> , 254 U. S. 242.....	24
<i>The Thomas Jefferson</i> , 10 Wheaton, 428.....	25
The Parker Mills <i>vs.</i> Jacot, 8 Bosworth 161.....	38
Towne <i>vs.</i> Collins, 14 Mass. 500.....	27
Tucker <i>vs.</i> Alexanderoff, 183 U. S. 424.....	35
Union Fish Co. <i>vs.</i> Erickson, 248 U. S. 308.....	18
United States <i>vs.</i> Inness, 218 Fed. 705.....	36
U. S. <i>vs.</i> United Shoe Machinery Co., 247 U. S. 32....	16
Washington <i>vs.</i> Dawson & Co., 264 U. S. 219.....	19
White's Bank <i>vs.</i> Smith, 7 Wall. 646.....	19, 24, 37
Williams <i>vs.</i> Prov. Wash. Ins. Co., 56 Fed. 159.....	32
Wood <i>v.</i> Stockwell, 55 Maine 76.....	38



SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1926.

JAMES STEWART & COMPANY,
Plaintiff-in-error,
against
DOMINICK RIVARA,
Defendant-in-error.

No. 290

BRIEF FOR PLAINTIFF-IN-ERROR, OPPOSING
DEFENDANT'S MOTION TO DISMISS THE
WRIT OF ERROR, OR TO AFFIRM.

STATEMENT.

The proceedings sought here to be reviewed have resulted in Rivara's recovery in the State Court of his payments under a contract for a conditional purchase from Stewart of an ocean going steamtug, *James B. Stewart*, made April 17th, 1919.

The main question arose under Sections 65 and 66 of the N. Y. State Personal Property Law (Consol. Laws, Chap. 45) which provide:

"SEC. 65. SALE OF PROPERTY RETAKEN BY VENDOR. Whenever articles are sold upon the condition that the title thereto shall remain in the vendor, or in some other person than the vendee, until the payment of the purchase price, or until the occurrence of a future event or contingency, and the same are retaken by the vendor or his successor in interest, they shall be retained for a period of thirty days from the time of such retaking, and during such period the vendee or his successor in interest may

comply with the terms of such contract, and thereupon receive such property. After the expiration of such period, if such terms are not complied with, the vendor, or his successor in interest, may cause such articles to be sold at public auction. Unless such articles are so sold within thirty days after the expiration of such period, the vendee or his successor in interest may recover of the vendor the amount paid on such articles by such vendee or his successor in interest under the contract for the conditional sale thereof."

"SEC. 66. NOTICE OF SALE. Not less than fifteen days before such sale, a printed or written notice shall be served personally upon the vendee, or his successor in interest, if he is within the county where the sale is to be held; and if not within such county, or he cannot be found therein, such notice must be mailed to him at his last known place of residence.

Such notice shall state

1. The terms of the contract.
2. The amount unpaid thereon.
3. The amount of expenses of storage.
4. The time and place of the sale, unless such amounts are sooner paid" (*Record*, pp. 10, 11).

This suit was upon a conditional sale of the tugboat *James B. Stewart* on April 17th, 1919 to the plaintiff by James Stewart & Company, Inc., for \$32,500, which plaintiff was to pay in installments, with a condition that title to the tug should not pass to plaintiff until all installments be paid (A copy of this contract is set out *Record*, pp. 8-10).

James Stewart & Company, Inc., a New York corporation, acted in this sale as agent for James Stewart & Com-

pany, a New Jersey corporation, which owned the tug (*Record*, p. 47).

The contract of sale provided that in case of default by plaintiff, James Stewart & Company, Inc., should have the right to reenter and take possession of the tug; and that in such event all of plaintiff's payments on the purchase price should be applied solely as rental, plaintiff waiving any and all claims that he might have to the tug.

Plaintiff contracted to keep the tug in first class repair and condition, and free of any libels, pending the fulfillment of the agreement.

Plaintiff also agreed that James Stewart & Company, Inc., should place insurance on the tug for its value against fire, marine, accident, liability, compensation, loss and towers' liability, and any and all other forms of insurance which James Stewart & Company, Inc., might deem proper for the protection of the tug, and that plaintiff should pay the premiums for such insurance.

The tug was delivered to plaintiff on April 17, 1919, plaintiff paying \$5,500 on the purchase price. Plaintiff continued his payments aggregating \$23,518.87 until October 27th, 1920 (*Record*, pp. 47, 48).

After that date plaintiff defaulted in payments.

Accordingly James Stewart & Company took admiralty proceedings by libel for possession of the tug, and obtained possession by a decree of the United States District Court for the Southern District of New York, dated April 7, 1921 (*Record*, pp. 12, 13).

While plaintiff had possession of the tug, James Stewart & Company took out insurance policies on the tug and paid the premiums therefor, which premiums were to be paid by plaintiff under the contract.

James Stewart & Company either itself or through its agent, James Stewart & Company, Inc., also expended certain other sums for disbursements and advances for the repair and upkeep of the tug while in the possession of the plaintiff—which plaintiff has never paid.

Plaintiff sued James Stewart & Company and James Stewart & Company, Inc., for \$23,518.87, as the amount of payments made on the purchase price of the tug.

The plaintiff's gravamen was that the Personal Property Law of the State of New York relating to conditional sales became a part of the agreement; that though plaintiff did not make good his default or redeem the tug after James Stewart & Company took possession, the defendant did not comply with sections 65 and 66 of the Personal Property Law of New York, in that the defendant did not give notice of sale of the tug at auction or otherwise and failed to sell the tug within 30 days.

The answers averred that the State Personal Property Law did not apply to vessels like this tug, documented in the United States Custom House and set forth certain counterclaims for moneys paid to or for the plaintiff.

Plaintiff below has recovered as damages the sum of \$8862.26 with \$126.75 costs, a total of \$8989.01. (*Record*, p. 54).

The cause is reported as *Rivara v. Stewart*, 241 N. Y. 259. The opinion will be found in the record, pp. 86-91.

Upon errors assigned (*Record*, pp. 91-93) Hon. Frank H. Hiscock, Chief Judge of the New York Court of Appeals, allowed the writ of error to this Court on January 13th, 1926 (*Record*, pp. 94, 95).

The present decision, if upheld in this Court, will require all conditional vendors of ships and vessels, to com-

ply not only with the provisions for filing in local counties, wherever a vendee may be *resident*, but will invalidate all takings from a defaulting vendee, unless such ship or vessel be held as "reserved" for the period of thirty days; then thereafter on a notice of not less than fifteen days, the article is to be sold at public auction without any provision for advertisement of such sale. For unless such vessel be thus sold within the fixed period, the vendee is to recover his purchase payments.

Here is a regulation for a sale by auction on notice only to the vendee with no provision for posting bills or advertising such auction.

This sale, when made, of course cannot extinguish the maritime liens on the vessel. The procedure of sale good enough for a piano, or an automobile, is thus applied to a vessel in interstate commerce, of which the record titles and liens are recorded in the Custom Houses of the United States in pursuance of an Act of Congress of July 29, 1850, entitled An Act for Recording of Vessels and Other Purposes.

The Congress has created a form of property known as "*Vessels of the United States*".*

* In Navigation Laws of United States 1923, page 1, it is provided as follows:
"Vessels of the United States.

Vessels registered pursuant to law and no others, except such as shall be duly qualified according to law for carrying on the coasting or fishing trade, shall be deemed vessels of the United States and entitled to the benefits and privileges appertaining to such vessels; but no such vessels shall enjoy such benefits and privileges longer than it shall continue to be wholly owned by a citizen or citizens of the United States or a corporation created under the laws of any of the States thereof, and be commanded by a citizen of the United States. And all the officers of vessels of the United States who shall have charge of a watch, including pilots, shall in all cases be citizens of the United States." (R. S. 4131; May 28, 1896.)

The Act of 1850 above referred to provided for the recording of titles of and encumbrances on *vessels of the United States*.

The tug *James B. Stewart* was a vessel of the United States.

The Trial Court found that, as stipulated by the parties:

1. "Said tugboat was at all times documented by its owner, James B. Stewart & Company, a New Jersey corporation, in the Custom House at the port of New York, under the laws of the United States as a vessel of the United States and was duly enrolled under the said laws for coasting voyages between ports of the United States" (*Record*, p. 49).
2. That the plaintiff operated the tug "in commerce, both interstate, and intrastate" (*Record*, p. 47).

A copy of the contract of sale was filed on April 30, 1919, in the County Clerk's office in the County of Queens at Jamaica, Long Island. It was never afterwards refiled (*Record*, p. 48).

Justice Faber, a jury trial having been waived, also found that plaintiff made payments totalling \$23,518.87 and that the reasonable rental value of the tug while in plaintiff's possession amounted to \$24,000, a sum which exceeds by \$481.13 the total of plaintiff's payments (\$23,518.87) on account of the purchase of the tug (*Record*, pp. 47, 49).

The Court allowed interest on \$23,518.87 from November 1, 1921, when the action was commenced, amounting to \$4,586.17, which, added to the principal makes \$28,105.04 (*Record*, p. 49).



^{W.D.}
law in respect of
mines

1. The party in error argues that Congress has covered the field

It quotes 4192 (p. 5)

It says Congress has enacted § 1492
which provides that if

argue that provision requiring record of
nature of sale is burden. ~~Result appears to be~~
involved

He found that during possession of the tug by plaintiff, James Stewart & Company, Inc., paid out for insurance, supplies and the repair and upkeep of the tug, with interest from the date of each disbursement, as follows (*Record*, p. 49):

	<i>Amount</i>	<i>Interest</i>	<i>Total</i>
Schedule B.....	\$4,416.58	\$464.17	\$4,880.75
Schedule C.....	10,907.29	3,233.68	14,140.97
Paragraph 4.....	179.84	41.22	221.06
Aggregating.....			\$19,242.78

Justice Faber held that plaintiff was entitled to recover his payments with interest amounting to \$28,105.04. He sustained the defendant's three counterclaims with interest amounting to \$19,242.78, leaving a balance in favor of the plaintiff of \$8,862.26 (*Record*, p. 50).

He held, over the objection of defendant's counsel, that the conditional sale of the tug was subject to the provisions of the Personal Property Law of the State of New York (*Record*, p. 50).

He also held over like objection of defendant's counsel that the Personal Property Law of the State of New York, as applied to the conditional sale of the tug, was within the power of the Legislature of the State of New York and was not repugnant to the Constitution and the laws of the United States (*Record*, p. 50).

He ruled that the reasonable rental value of the tug while in plaintiff's employment was not a subject of credit or allowance to the defendant (*Record*, p. 50).

Plaintiff was required to elect against which of the two defendants he would demand judgment. Plaintiff elected

to take judgment against the owner, defendant, James Stewart & Company (*Record*, p. 50).

The Court gave judgment against defendant James Stewart & Company for \$8,862.26 with costs of \$126.75, totalling \$8,989.01 (*Record*, p. 54).

Both parties, plaintiff, and defendant, James Stewart & Company, excepted to the Court's decision.

EXCEPTIONS OF DEFENDANT JAMES STEWART & COMPANY.

1. That the conditional sale of the tug is not subject to the Personal Property Law of the State of New York.
2. That the Personal Property Law of the State of New York, if applicable to the conditional sale of the tug, is beyond the power of the legislature of the State of New York, and contrary to the Constitution and laws of the United States.
3. That the Court did not grant judgment to defendant for the total sum of the counterclaims (*Record*, pp. 52, 53).

PLAINTIFF'S EXCEPTIONS.

1. To the refusal of the Court to reject defendant's counterclaim, amounting to \$10,907.29, with interest, as set forth by Schedule C annexed to the stipulation.
2. To the refusal of the Court to allow the plaintiff a judgment for the full amount of his payments (*Record*, pp. 51, 52).

STATEMENT OF POINTS RELIED ON HERE.

James Stewart & Company, plaintiff in error, intends to rely upon the following points in prosecution of the writ of error herein and contends (*Record*, pp. 99-102) :

I. That the Court of Appeals and the Supreme Court of the State of New York, in deciding herein that Sections 65 and 66 of the Personal Property Law of the State of New York—Laws 1909, Ch. 45;—as applied to the conditional sale of the tug *James B. Stewart*, were not unconstitutional, erred in that the statutes, so applied, constitute a regulation of, and a burden upon, commerce among the several states in violation of Article I, Section 8, of the Constitution of the United States and laws of the United States enacted thereunder.

II. That the Court of Appeals and the other Courts of New York State, in deciding herein that such sections of the Personal Property Law of the State of New York—Laws 1909, Ch. 45—as applied to the conditional sale of the tug *James B. Stewart* were not unconstitutional, erred in that the statutes so applied conflict with, and are in violation of laws of the United States namely, *The Act of July 29, 1850*,* entitled “*An Act to Provide for Recording Conveyances of Vessels and for other purposes*” now U. S. Rev. Stat. 4192.

III. That the Court of Appeals and the Supreme Court of New York State in deciding herein that the Personal Property Law of the State of New York—Laws 1909, Ch. 45—as applied to the conditional sale of the tug *James B. Stewart*, were not unconstitutional, erred in that the statutes, so applied, infringe on the exclusive admiralty and maritime jurisdiction of the United States in violation of Article III, Section 2, of the Constitution of the United States and laws of the United States enacted thereunder,

* Erroneously cited in the Record as June 29th.

and such application of the State Statutes contravenes the essential purposes of acts of Congress and works material prejudice to the characteristic features of the admiralty law in the proper harmony and uniformity of that law in interstate relations.

IV. That the Court of Appeals and the Supreme Court of the State of New York erred in not rendering judgment in favor of plaintiff in error, herein, because said Personal Property Law of the State of New York—Laws 1909, Ch. 45—as applied to the conditional sale of the tug *James B. Stewart* and as applied to plaintiff in error, is unconstitutional and void and in conflict with, and in violation of, Article I, Section 8 and Article III, Section 2 of the Constitution of the United States and also in conflict with the Laws of the United States, namely the Act of July 29, 1850, entitled “*An Act to Provide for Recording Conveyances of Vessels and for other purposes*”, U. S. Rev. Stat. 4192.

V. That by Acts of Congress the Federal Government has permitted the creation under certain conditions by the authority of the Commerce Clause of a special kind of personal property, which has been, so to speak, federalized. This new special form of property is known as “*vessels of the United States*”, which are required by Act of Congress to be documented in a Custom House of the United States. Consequently, the Personal Property Law of the State of New York should not have been held to affect a “*vessel of the United States*” properly documented in the proper Custom House, because so to hold is an invasion of a zone already occupied by Federal legislation and an

interference with a special form of property created by Congress as to which a State statute should not be held to have any application.

VI. That in 1900, when the New York Personal Property Law was amended to require an auction sale of articles re-taken by the vendor—Laws of 1900, Chapter 762—it had long been settled that the United States statute for recording instrument of title of "*vessels of the United States*" controlled and superseded all State legislation on this subject.

VII. That statutes similar in their general effect to Sections 65 and 66 of the New York Personal Property law have been passed in other States but have hitherto not been applied to documented vessels, but, if so applied, it would not only, as above pointed out, be an improper interference with Federal Powers under the Commerce Clause but it would destroy the uniformity of the Admiralty and Maritime law as applied to vessel property throughout the United States.

VIII. That Section 65 of the New York Personal Property Law requires that the articles re-taken by the vendor be retained for thirty days "*during which the vendee may comply with the terms of such contract and thereupon receive such property.*"

That this provision would tie up a vessel, possibly a large ocean steamship, while awaiting payment from a defaulting buyer;

That after this thirty days, there are to be fifteen days notice of sale; that, therefore, Sections 65 and 66 of the

New York Personal Property Law would keep a re-taken vessel idle for forty-five days incurring the expense of wharfage and charges of watchmen;

That this would not only constitute a violation of the ancient principle "*that ships are built to ply the seas and not to rot by the wharves*", but would also constitute a very serious interference with "*vessels of the United States*" which might be sold conditionally under such contracts as in this case, and that such a construction of the New York Personal Property Law constitutes a serious interference with commerce and with the uniformity of the admiralty and maritime law which, as this Court has often said, must be uniform throughout the United States.

IX. That a sale under a State Act of this kind would not give a good title to a vessel and that, therefore, the purchaser of a vessel sold by auction under such a State statute would not be willing to give a fair price for the vessel, because if he purchased the vessel, it would be subject to unknown maritime liens not only in the ports of the United States, but, if the vessel were engaged in foreign commerce, she would also be subject to proceedings in any admiralty or maritime Court of any foreign port at which she might touch; "*vessels of the United States*" should not be subject to such possible infirmities of title.

X. That a State legislature is not allowed to invade a constitutional field of Federal legislation which has already been occupied by Congress or to endeavor to supplement such Federal legislation.

XI. That the Courts below erred in applying the "*admiralty jurisdiction*" test which it invoked for that is a question of the jurisdiction of a particular Court, whilst here is a question of general constitutional law.

XII. That even if the wording of the statute were doubtful, under well settled principles it should be held to apply only to property properly under the authority of State legislation and a "*vessel of the United States*" which is a creature of Congressional legislation is not such form of property.

XIII. That as the records of sales or conveyances of vessels of the United States are solely regulated by the laws of Congress and as the titles are recorded in the appropriate Custom Houses of the United States there is always a place for anyone dealing with a vessel to go in order to find out who her owner is, and, hence, it is impossible to misconstrue possession as being ownership.

XIV. That the Court of Appeals and the Supreme Court of New York State erred in not rendering judgment in favor of the plaintiff in error—defendant below—whereby the complaint would have been dismissed and the plaintiff in error—defendant below—would have had judgment in full for its counter claims against plaintiff below.

FIRST POINT

THE RECORDS OF SALES OR CONVEYANCES OF VESSELS OF THE UNITED STATES ARE SOLELY REGULATED BY THE LAWS OF CONGRESS AND THE CREATION OF THE FORM OF PROPERTY KNOWN AS VESSELS OF THE UNITED STATES BY CONGRESS NATIONALIZED SUCH PROPERTY AND BROUGHT IT WITHIN THE EXCLUSIVE DOMAIN OF INTERSTATE COMMERCE.

Congress had in 1850 fixed and regulated the documents of vessels to go into a public record and determined where such record should be kept. That regulation of commerce controls.

In *Prigg v. Pennsylvania*, 16 Peters 539, 617, Story, J., delivering the opinion of the Court said:

"The legislation of Congress, if constitutional, must supersede all State legislation upon the same subject; and by necessary implication prohibit it. For, if Congress have a constitutional power to regulate a particular subject, and they do actually regulate it in a given manner, and in a certain form, it cannot be that the State legislatures have a right to interfere, and as it were by way of complement to the legislation of Congress to prescribe additional regulations and what they may deem auxiliary provisions for the same purpose. In such a case, the legislation of Congress in what it does prescribe, manifestly indicates that it does not intend that there shall be any further legislation to act upon the subject-matter. Its silence as to what it does not do, is as expressive of what its intention is as the direct provisions made by it."

The States' power over commerce has three degrees: *First*, exclusive; *second*, in the absence of legislation by

Congress, *i. e.*, until Congress does act; *third*, when Congress has acted, the power of the State cannot operate at all.

So. Railway v. Reid, 222 U. S. 444.

In regard to registration of documents of title of vessels, Congress has so acted by Statute of July 29th, 1850 (U. S. Rev. Stat. §4192).

That federal legislation of this kind must be exclusive, appears in two leading cases.

In *People v. Erie R. R. Co.*, 233 U. S. 671, defendant had been fined for breach of a State labor law that limited a telegrapher in charge of a block signal station to eight hours' work, although the Federal Act permitted nine hours. It was held that the State labor law did not apply.

A labor conflict arose as to the State statute of distributions, when applied to the Federal Employers' Liability Act of 1910. A locomotive fireman had been killed, leaving a widow and parents, but no children. The widow, as administratrix, recovered. The controversy was with the father of the deceased, who would be entitled to share under the New York State Statute. It was finally held that the Federal Statute had superseded all State legislation on the subject, so that the father could not recover.

In re Taylor, 232 U. S. 363.

Whether in any matter Congress acts exclusively or has dealt only with a fragment of the subject, intended that its more complete regulation may be pieced out by the States, often is tested by considering the practical effect.

Does the situation call for any supplemental local legislation?

Would it aid, and not burden commerce?

Can anyone question that commerce is well regulated by having to look for ship transfers and sales in the custom house for the home port, and not to face the difficulty of searches among the various places where the vendee has resided?

The Custom House registry of a U. S. vessel contains much more than the name of the ship, her home port, and the names and residences of her enrolled owners.

It must set forth measurements of the hull, and of the crew spaces, the features of the build, with tonnage, gross and net, and a multitude of other prescribed details. U. S. Rev. Stat. §4155, as amended (28 Stat. at Large 741).

A mortgage has also to have enough of these particulars to identify the vessel among those having the same or similar names.

By means of one place of registry for sales, transfers, and record encumbrances an examiner of titles, if in doubt, can satisfy himself by referring back to the original registry.

Obviously this could not be done with the files of a county clerk, or other state official, with whom was deposited an instrument affecting a registered, or enrolled vessel.

Is it reasonable to suppose that these regulations for ships of commerce, in this simple business-like method, could be disorganized by the legislation of one State, which statute on its face is no wise adapted to shipping, or to a system of convenient ships transfers?

Suppose the practice by certain patentees of leasing their machines (see *U. S. v. United Shoe Machinery Co.*, 247 U. S. 32) became so extensive that some State should

enact that all leases, contracts for letting and hiring chattels of over fifty dollars in value, should be filed in the town of the lessee's residence, or in the place where the subject matter was at the time of its delivery under such contract, with a penalty for non-compliance of refunding all instalments of hire paid.

Suppose then, that it should be urged that a ship was such a chattel; and as the charter-party of a vessel is not required to be recorded in a custom house (*Hill v. The Golden Gate*, Newbury Rep. 309, Federal Cases No. 6492), that this non-action of Congress left that subject open to the States, as to charter-parties—as in the case at bar is urged as to conditional sales—and therefore the charterer could sue for the back hire so collected on an unfiled charter party.

Would not the conclusive answers be:

- (1) the intent of such legislation never included vessels; and
- (2) that such an added burden upon the employment of vessels engaged in commerce was not within the constitutional power of any State?

Thus the State Statute of Frauds of California (Civil Code, §1624) requiring writing for contracts not to be performed within one year, though in sweeping terms, was held not to apply to an oral engagement of a ship master to go to sea, Mr. Justice Day declared that the parties:

“Were making an engagement for the services of the master of the vessel, the duties to be performed in the waters of Alaska mainly upon the sea. The maritime law controlled in this respect, and was not subject to limitation because the particular engagement happened to be made in California.
* * * If one State may declare such contract void for one reason, another may do likewise for another.

Thus the local law of a State may deprive one of relief in a case brought in a court of Admiralty of the United States, upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the States."

Union Fish Co. v. Erickson, 248 U. S. 308, 313, 314.

It is unsound to attempt to support such a local interference with federal regulation of shipping as an exercise of the "police power" of a State.

A State

"May not, under the cover of exerting its police powers, substantially prohibit or burden either foreign, or inter-state commerce."

Railroad Company v. Husen, 95 U. S. 465, 472.

See

Kansas City Railway Co. v. Kaw Valley Drainage Dist., 233 U. S. 75;

Missouri v. Kansas Gas Co., 265 U. S. 298.

See also

12 Corpus Juris, page 15.

One reason for holding that State Employer's Liability Acts do not apply to a seaman on the vessels of the Great Lakes is that the vessel owner might be subject to seven State jurisdictions bordering on such Lake traffic, where rights may vary in the different possible places of accident.

Schueder v. Zenith S. S. Co., 216 Fed. 566, affd. 244 U. S. 646.

See also:

Washington v. Dawson & Co., 264 U. S. 219;
Robins Dry Dock Co. v. Dahl, 266 U. S. 449.

By long and gradual steps we have come to realize that sea commerce depends on retaining the maritime law in its uniformity.

Chelentis v. Luckenbach S. S. Co. Inc., 247 U. S. 372;
Ex Parte State of New York, 256 U. S. 490;
State of Washington v. Dawson, 264 U. S. 219;
Panama Railroad Co. v. Johnson, 264 U. S. 375.

A break in the line of decisions that should put back shipping under varying State legislation could not be endured.

To require that one set of contracts for vessels should be filed with county clerks or other local officials away from the vessel's home port, is more than to cause inconvenience and raise a conflict.

It would be turning back to the half forgotten era of State particularism in New York in 1868, before Mr. Justice Nelson's exposition of State and Federal powers in the case of *White's Bank v. Smith*, 7 Wall. 646.

Counsel urged, in the court below, that the requirement to file such a sale contract is merely for notice to third persons; since an unfiled contract is, of course, valid *inter partes*. Hence that this feature may be disregarded, as of minor importance.

But this provision is here a cardinal requirement (Personal Property Law, §§62-63). Being ineffective with

documented vessels, and in conflict with existing acts of Congress (as must be conceded), the whole scheme of this State statute fails in respect of "vessels of the United States" as defined by the act of Congress. It is quite clear therefore that the State law did not, and could not, affect the tug *James B. Stewart*.

SECOND POINT.

THE RESULT OF THE DECISION OF THE NEW YORK COURT OF APPEALS AS TO THE EFFECT OF THE NEW YORK PERSONAL PROPERTY LAW ON VESSELS OF THE UNITED STATES IS AN INTERFERENCE WITH INTERSTATE COMMERCE BECAUSE IT WITHDRAWS THE VESSEL FROM COMMERCE FOR A PERIOD OF UPWARDS OF THIRTY AND POSSIBLY SIXTY DAYS, DURING WHICH PERIOD IT INTERFERES WITH THE UNIFORM ENFORCEMENT OF ADMIRALTY LAW IN THAT DURING THAT PERIOD IT CONFLICTS WITH THE ENFORCEMENT OF MARITIME LIENS AGAINST THE VESSEL.

The practical working of the New York Statute vis-a-vis the jurisdiction of our admiralty courts is something which should be borne in mind from the outset.

The requirement of Section 65 above quoted, if *applied to vessels of the United States*, as the Court of Appeals has attempted to do, is that the vessels must be retained for a period of thirty days from the time of the retaking, and that during that period the vendee has a *locus penitentiae* and can comply with the terms of his conditional sales contract and thus get the property back.

After the expiration of the first thirty day period from the retaking, in case the vendee does not exercise his statutory option, the vendor is to have the vessel sold at public

auction. If he does not have it so sold within thirty days after the expiration of the vendee's option (that is, sixty days after the retaking), the vendee may recover of the vendor the amount paid on the vessel by him.

What does this mean, if this act does apply to vessels of the United States, as the Court of Appeals of New York has held?

It means one of two things:

Either that during this period of sixty days, whilst the New York Conditional Sales Act is operative, the vessel is sacrosanct from any process in our admiralty court, and that a man who had furnished supplies to the vessel, a salvor who had salved the vessel, a cargo owner whose cargo had been damaged whilst on board the vessel, or a seaman with a wage claim against the vessel, would not be in a position to proceed *in rem* and foreclose the maritime lien which his claim gave him!

It is obvious that this position would not be supported in any Federal court, and probably not in any State court.

The other alternative is that the vessel is not immune during this sixty days from admiralty process, and that if the vendee has not paid the seaman or has not performed his carriage contract or paid his salvors, the vessel can be sued *in rem* in the admiralty courts and sold by the United States Marshal. Such a sale by the Marshal would prevent the vendor who had retaken the vessel from complying with the New York statute, and by such non compliance under the present ruling the vendor would be liable to return to the vendee all payments on account of the purchase price, and at the same time the vendor would have lost his vessel by sale under maritime liens incurred during the vendees' operating the vessel under the conditional contract of sale.

A conditional vendee in running a vessel is incurring maritime liens continually at whatever port the vessel touches, and of course the seamen have a prior lien for their wages.

If the conditional vendee is unable to keep up the payments on his contract, it is more than probable that he has failed to pay for the vessel's supplies and necessaries.

It is submitted that the New York Court of Appeals has taken an erroneous view of the situation, and has not considered all the practical results of its decision, because, as this Court well knows, claimants who have maritime liens insist on libeling a vessel *in rem* to enforce their liens promptly, to avoid the danger that other liens may come to outrank them, unless their action is taken with diligence.

We submit that nothing could be a more obvious answer to the Court of Appeals' decision than the suggestions above set forth.

Judge Cardozo, in writing the opinion of the Court, said, *Record*, p. 89:

"* * * In effect, a conditional sale is assimilated to a mortgage (2 Williston on Sales, Sec. 579, at p. 1427). We find nothing in any act of Congress that pre-empts this field of regulation or even touches it remotely (*The J. E. Rumbell*, 148 U. S. 1, 16). The contract is not maritime (*Bogart v. S. S. John Jay*, 17 How. (U. S.) 399, 401, 402; *The Ada*, 250 Fed. Rep. 194, 198). The regulation of its incidents does not involve any interference, unless indeed the most remote and indirect, with interstate commerce (*Heisler v. Thomas Colliery Co.*, 260 U. S. 245; *Langston Monotype Machine Co. v. Curtis*, 224 Fed. Rep. 403)."

It is submitted that Judge Cardozo erred when he speaks of the New York statute as not involving interference, unless the most remote and indirect, with interstate commerce. Certainly to take a vessel out of interstate commerce in this way is a direct interference with interstate commerce, and furthermore the Judge seems to have overlooked entirely the question of admiralty procedure and the enforcement of maritime liens above mentioned.

It seems to us that this alone must be sufficient to lead this Court to deny the present motion, and eventually to hold that the decision of the New York Court of Appeals was erroneous, for it is unthinkable either that creditors of a vessel having maritime liens against her should be prevented from enforcing those liens, or that the defaulting vendee should have it in his power, by refusing to pay off the maritime liens on the vessel, to let her be sold in the admiralty court, and thus by his default on payment of his own debts to creditors of the vessel, put himself in a position to claim a return of the purchase price owing to the vendors being prevented by the sale in the admiralty court from complying with the New York statute.

T H I R D P O I N T .

THE COURT OF APPEALS SEEMS TO HAVE BEEN MISLED BY THE RULING OF THE COURT AT SPECIAL TERM AS TO THE ADMIRALTY JURISDICTION TEST, WHICH IT MISAPPLIED.

Mr. Justice Fawcett fell into the error (advanced by plaintiff's counsel) of confusing this Regulation of Commerce with the jurisdiction of the Court of Admiralty. He thus reasoned:

"And there is nothing maritime in the sale of a vessel or in its conditional sale. 'For a contract to fall within the admiralty jurisdiction, it must concern transportation by sea, relate to navigation or maritime employment, or be one of navigation and commerce within navigable water. * * * The rule is well settled that contracts for building or for selling a ship are not maritime contracts and within the jurisdiction of admiralty.' *Grant Smith Porter Ship Co. v. Rhode, Sup. Ct. Repr.* Advance Opinions Feby. 1, 1922, at p. 157; *Thames Towboat Co. v. The Francis McDonald*, 254 U. S. 242; *The Ada*, 250 *id.* 194, 196. The contract of conditional sale in this case, therefore, is within the scope of the cited sections of the Personal Property Law, if a steamtug is an 'article' of 'goods and chattels' within the sense of the terms of the statute." 119 Misc. 73, 76.

This fallacy of the test of admiralty jurisdiction as applied to regulation of commerce is evident.

Congress has power

"to regulate commerce with foreign nations and among the several states and with the Indian Tribes."

U. S. Constitution, Art. 1, Sec. 8, subd. 3.

Under this power Congress has legislated as to the enrollment, licensing and registration of vessels engaged in commerce, and of seamen so employed.

White's Bank v. Smith, 7 Wall. 646.

These are plenary powers under a fundamental provision of the Federal Union.

The legislative function of Congress cannot depend on the imperfect jurisdiction, or the limits upon the jurisdiction of one of the constitutional courts it has created.

When the Constitutional Convention met in 1787, each State had its Admiralty, or Maritime Court, with an appeal to Congress, or to some State or Federal body. Yet the subject of admiralty jurisdiction was not considered as a part of the judicial power until near the end of the debates, when the clause "cases of admiralty jurisdiction" was interpolated in the report of the Committee of Detail in its judiciary article, after nearly three months of the convention's deliberations.

Meigs, "*Growth of the Constitution*," p. 345,
Philad. 1900. Facsimile of Mason MSS. Appendix VII.

It seems a strange and perverted line of reasoning that today would seek to limit the exercise of this Congressional power by the varying fluctuations of the jurisdiction of the Court of Admiralty.

Perhaps the error is best shown by the varied views of the territorial jurisdiction of the U. S. Admiralty Courts.

It was bitterly contested before the Civil War era. No Federal jurisdiction has undergone more changes.

Before the year 1845 the District Courts in admiralty had no jurisdiction over the expanding commerce upon our Western rivers, and in the Great Lakes, from the rule that kept to the English standard of the ebb and flow of tide.

The Thomas Jefferson, 10 Wheaton 428;
The Genesee Chief, 12 Howard 443;
The Eagle, 8 Wall. 15.

Yet from the organization of the general government, Congress has been steadily regulating commerce on our internal navigable rivers.

Act of February 18, 1793, Sec. 16, for enrolling and licensing ships or vessels. 1 U. S. Stat. at Large, 305, 311.

Act of March 2, 1819, Supplementing acts concerning the Coasting Trade. 3 Stat. at Large, p. 492.

Act of May 7, 1822, for duties on imports and tonnage in Florida. 3 Stat. at Large, p. 684.

All these Congressional statutes expressly included "navigable rivers" of the United States.

Benedict's *Admiralty* (3d Ed.) 1894, p. 128.

In the judgment in *Gibbons v. Ogden*, 9 Wheaton 1; Marshall, C. J., in 1824, speaking of the commerce of the United States, said at p. 195 (italics ours):

"The commerce of the United States with foreign nations is that of the whole United States. Every district has a right to participate in it. The *deep streams which penetrate our country in every direction, pass through the interior of almost every State in the Union*, and furnish the means of exercising this right."

There was no hint that commerce was dependent on the admiralty jurisdiction.

More striking is the Act of July 7th, 1838 (ch. 191), which regulated steam vessels of 200 tons or upwards "at sea, or on the Lakes, Champlain, Ontario, Erie, Huron,

Superior and Michigan," thus including fresh water beyond the tides. Such vessels were required to carry two long boats of yawls to take 20 persons. By Section 10 steamboats were to carry one or more signal lights, between sunset and sunrise. 10 Stat. at Large, p. 168.

Thus Congress regulated this Lake commerce seven years in advance of the admiralty jurisdiction being extended over the Great Lakes.

Other illustrations would be superfluous that the commerce powers of the Constitution are in no way affected by the changing limits of the admiralty jurisdiction of the United States District Courts.

F O U R T H P O I N T .

THE NEW YORK PERSONAL PROPERTY LAW WAS NOT INTENDED TO, AND CONSTITUTIONALLY CANNOT, AFFECT VESSELS OF THE UNITED STATES DOCUMENTED IN A UNITED STATES CUSTOM HOUSE.

(a) *The origin of such legislation.*

The risk and difficulty from dealing with an apparent owner, who was without any real title to personal chattels, has been long realized.

In the City of London this was mitigated by the theory that urban sales were made in "Market Overt." That doctrine did not obtain in the United States.

Tourne v. Collins, 14 Mass. 500.

To meet a like difficulty a "Factor's Act" was passed in England in 1824, and a similar act in New York was later enacted. (L. 1830, ch. 179, Sec. 1.)

See

Schmidt v. Simpson, 204 N. Y. 434.

Conditional sales—that is articles physically passing to a vendee, with the vendor reserving title until paid—made a false appearance of ownership.

The buyer with possession often used the property as if it were already his own.

The term “conditional sale” is indeed a misnomer, as there can be no *sale*, without passing title. It amounts only to an executory contract for a future sale with a present delivery.

This apparent title led to abuses. 2 Kent Com. 528, 529; see *Bissell v. Hopkins*, 3 Cowen 166, 189, note.

Recording Acts have been passed in many states, says Prof. Williston, because

“conditional sales have become so common under modern methods of business, and are so *deceptive* both to purchasers from the buyer, and to the buyer’s creditors.” (Williston on Sales, §327.)

“The statutes of each State vary, but in general the recording of the transfer is equivalent to a change of possession.”

Bump on Fraudulent Conveyances, page 130
(2nd Ed.) 1876.

In the 1897 revision of New York Statute Law was a Lien Law of ten articles, of which Article II treated of “Liens on Vessels,” and Article IX, “Contracts for Conditional Sale of Goods and Chattels” (Chap. 418, Laws of 1897).

Having to deal with vessels in re-enacting the former State Lien Law as to vessels (L. 1862, ch. 482), the commissioners prefaced their text of Article II with a "Preliminary Note," in which was set out, with entire accuracy the separation of State and Federal Powers, with citation of authorities. *Assembly No. 80*, April 22nd, 1897.

In this report, and as part of the identical Lien Law, was Article IX, "Contracts for the Conditional Sale of Goods and Chattels." In it were Section 111, Railroad Equipment; Section 112, Conditions and Reservations in Contracts for the Sale of Goods and Chattels; Section 113, Where the Contract is to be Filed; Section 114, Indorsement Entry Refiling and Discharge of Conditional Contracts; Section 115, Excluding Certain Articles from the Act; Section 116, Sale of Property Retaken; Section 117, Notice of Sale; Section 118, Disposition of Proceeds.

The provisions for sale, after retaking was introduced on May 4, 1900 (L. 1900, ch. 752, sec. 1).

These conditional sale provisions, therefore, were an integral part of a larger enactment, in which ships and vessels, though appearing side by side (so to speak) with conditional sale contracts, were given a separate treatment, consistent with that class of property.

(b) *The wording of the statute.*

The term "goods and chattels." The Legislature has specified *goods*, *chattels*, with the more significant word "articles." Such terms do not ordinarily include "vessels."

Thus in Lord Coke's time, personal property was thus described:

"Goods, *biens, bona*, includes all chattels reall as well as personall. Chattels is a French word that signifies goods, which by word of art we call *catella*, now goods or chattels are either personall or reall. Personall as horse or other beasts, household stuffe, bows, weapons and such like called personall, because for the most part they belong to the person of a man, or else for that they are to be recovered by personall actions." Co. Litt. 118b.

Thus a steam engine installed to work a colliery was held not to come under the term "goods and chattels." *Coombs v. Beaumont*, 5 B. & Ad. 72.

A railroad mortgaged "its engines, cars, etc., and all other personal property in any way belonging or appertaining to the railroad of said company." This was held not to cover canal barges owned by said company.

Parish v. Wheeler, 22 N. Y. 494.

(e) *Vessels are distinct objects of legislation.*

Lord Tenterden, in the opening words of Abbott on Shipping, alluded to the distinct characters of ships.

"In the case of purchase it is necessary that the person who takes from him to sell should have power to do so, for though a sale of other goods by the person who is in possession of them does in many cases vest the property in the buyer, even when the seller himself has neither property in them nor authority to dispose of them, the same cannot take place with respect to ships, as there is no open market for the sale of them. Indeed, this species of property appears from very early times to have been evidenced by written documents, and at present always is so, which other movable goods rarely are, and therefore

the buyer has in this instance the means of ascertaining the title of any person who offers to sell, and can seldom be deceived, except by his own fault."

Abbott, "*Law of Merchant Ships and Seamen*," ch. 1, §1.

In a case of an American ship sold in London, Turner, *L. J.*, remarked:

"A ship is not like an ordinary personal chattel. It does not pass by delivery, nor does the possession of it prove the title to it. There is no *market overt* for ships."

Hooper v. Gumm, L. R. 2 Chan. 282, 290.

Likewise in the introduction to his work with the comprehensive title "Treatise on the Effect of the Contract of Sale on the Legal Rights of Property and Possession in Goods, Wares and Merchandise," Justice Blackburn said he did not touch on ships, since

"The law regulating the property in ships in some degrees differs from that affecting other movable property,"

and refers to Lord Tenterden's Treatise on Shipping. *Blackburn on Sales*, American Ed. 1847, page 2.

(d) *The U. S. Statute for Custom House record of vessels applies to all instruments affecting the title of vessels.*

The Act of July 29, 1850, entitled "An Act to provide for recording conveyances of vessels, and for other purposes" (now U. S. Rev. Stat. 4192), enacted that:

"No bill of sale, mortgage, hypothecation, or conveyance of any vessel or part of any vessel of the United States shall be valid against any person other than the grantor or mortgagor, his heirs and devisees, and persons having actual notice thereof, unless such bill of sale, mortgage, hypothecation or conveyance is recorded in the office of Collector of Customs, where such vessel is registered and enrolled."

Under the judiciary article of the Constitution (Art. 3, Sec. 2), the Federal judicial power extends "to all cases of admiralty and maritime jurisdiction."

But this jurisdiction, having inherited from England certain narrow territorial limits, and having also suffered in Coke's time by long conflicts with the encroaching powers of the courts of law, had been shorn of power, both regarding the subject matters of controversy, and as to the particular waters from which maritime questions might arise.

For example, it has no power today to reform any document, even a bill of sale of, or contract for the hiring of, a vessel, or any other written instrument of commerce.

Williams v. Prov. Wash. Ins. Co., 56 Fed. 159.

Its procedure is also peculiar, and originally was entirely foreign.

As an historic example, the Federal Process Act of 1789 provided:

"Section 2. And the forms and modes of proceedings in causes of equity and of admiralty, and of maritime jurisdiction shall be according to the course of the Civil Law." U. S. Stat. at Large, p. 93.

This was later changed by the Process Act of 1792 to read:

"According to the principles, rules and usages which belong to courts of equity and to courts of admiralty, respectively, as contradistinguished from courts of common law." I U. S. Stat. at Large, p. 276.

See

Manro v. Almeida, 10 Wheaton, 473, 478.

In contrast, the grant to regulate commerce was so plenary and unlimited as to divest the states of all power in that subject, leaving the power of Congress that of a sovereign.

Gibbons v. Ogden, 9 Wheaton 1, 210, 211.

In the convention that framed the Constitution, Mr. Madison observed—"that he was more and more convinced that the regulation of commerce was in its nature indivisible, and ought to be wholly under one authority."

The Passenger Cases, 7 Howard, 283, 396.

"All bills of sale of vessels registered or enrolled shall set forth the part of the vessel owned by each person and the part conveyed to each person purchasing." U. S. Rev. Stat. 4196.

The term "conveyance" covers even the less formal instruments of transfer. *Burpee v. Sparhawk*, 97 Mass. 342.

The title is recorded in Custom House of the home port, in the very place named in letters of the prescribed size, on the vessel's stern. U. S. Rev. Stat. 4178 as amended 29 Stat. at Large 491 ch. 67.

It was never imagined that documents of title for such vessels could be filed in some obscure inland country seat, perhaps in a State other than that of the home port.

(e) *The word "articles" is not descriptive of enrolled vessels.*

The things to be held for thirty days and then auctioned off on fifteen days' notice are "*articles*," a word never yet held to embrace a "*vessel*."

The constitutional provision that no tax or duty shall be laid on *articles* exported from any State has been held not to apply to a tonnage duty on foreign vessels engaged in the export trade.

Aguirre v. Maxwell, 3 Blatch. 140; 1 Fed. Cas. 212, 213.

So the Tariff Act of October, 1890, which laid duties upon all *articles* imported was held not to cover a steam yacht.

The Conquerer, 166 U. S. 110.

Brown, J., there said—

"Vessels certainly have not been treated as dutiable articles but rather as the vehicles of such articles and though foreign built and foreign owned are never charged with duties when entering our ports. * * * Not only is there no mention of vessels *eo nomine* in the Tariff Acts but there is no general description in which they could be included except as 'manufacturers of iron and wood.' But it is only by straining the word far beyond its ordinary import that we are able to apply the word 'manufacture' to a seagoing schooner rigged screw steamship."

The term *article* is something different from bulky and heavy commodities.

Harrison Supply Co. v. United States, 171 Fed. Rep. 406.

It is a stretch of language to extend the term “*articles*” so as to include a vessel, which is fast becoming the greatest and most complex product of human skill. Until she is launched, a vessel is a “mere congeries of wood and iron”; but when she takes the water, she is transformed to a new legal personality, with new rights, liabilities, and powers and subject to a distinct set of laws.

Tucker v. Alexanderoff, 183 U. S. 424.

In a prosecution under the English factory acts, it was claimed that a boy had been engaged in a manufacturing process, which the statute defined as “any manual labor incidental to the making of any *article* or part of an *article*. ”

Cockburn, C. J., said:

“I cannot bring myself to think that such a process as the making, or rather building of a ship was intended by such a definition of manufacturing process, as is given in subd. 7, viz.: ‘any manual labor incidental to the making of any article or part of an article.’ *Article* cannot surely be meant to apply to a *ship*, and I should hesitate very much before I could hold that a boy was employed in a factory merely because he was employed in some department of shipbuilding.”

Palmer’s Shipbuilding Co. v. Chaytor, 1869, 4 L. R. C. B. 209.

A steam tugboat is held not to come under the State Statute for guarding "shafting, set-screws, and machinery of every description," under the Labor Law, Section 2.

Shannahan v. Empire Engineering Corp., 204 N. Y. 543.

That was a question of construction of such general words as "factory," "mill," "workshop," or "business establishment."

Can the mere words "goods" and "chattels" in a State Statute extend its reach so as to cover "vessels of the United States"?

(f) *Shipping laws are sui generis.*

Terms for property in general, such as "chattels," or restrictions regarding immigration, or the landing of aliens, do not include seamen, or ship's crews. Such a wholesome limit has been recognized as an accepted canon of statutory interpretation.

If this Sales Act had been passed by Congress itself, instead of by a State, without some specific mention of ships or vessels, it would not apply to documented steam vessels.

Brown v. Duchesne, 19 Howard 183;

Taylor v. U. S., 207 U. S. 120;

Scharrenberg v. Dollar S. S. Co., 245 U. S. 122;

United States v. Inness, 218 Fed. 705.

This separation of particular vehicles of commerce is against the view that the word "articles" in Section 65 was to include a vessel.

Section 62 provides for contracts for articles to be attached to a building, which contracts are to be filed to identify the building to which they are to be affixed.

Section 63 applies to all other sale contracts, which do not go into a building, if the vendee resides within the State. Such contracts are to be filed in the clerk's or register's office of the local counties.

Section 64 attempts to apply to these sales the chattel mortgage provisions of Article 10 of the Lien Law, which requires refiling within a year (Sec. 235).

This demonstrates that the Legislature could not have meant to touch contracts for vessels enrolled or documented in Custom Houses, for since 1868 it has been settled that vessels so documented cannot be subjected to formalities, such as refiling, enacted by State laws for chattel mortgages.

White's Bank v. Smith, 7 Wall. 646.

Section 66 requires that the notice of auction sale shall specify besides the amount unpaid (3) "the amount of expenses of storage," which means objects *in store*, on which are incurred warehouse charges.

Section 65 requires that the articles retaken be retained for 30 days, "during which the vendee may comply with the terms of such contracts, and thereupon receive such property." This ties up the vessel while awaiting payment from the defaulting buyer. After this 30 days there are to be 15 days' notice of the sale.

Section 66, therefore, would keep the retaken vessel idle for forty-five days, incurring expense of wharfage, and charges of watchmen. It is a violation of the ancient prin-

ciple, "that ships are built to plow the seas, and not to rot by the walls"—a salutary doctrine that has allowed vessels to be bonded, and then proceed on their mission of sea commerce.

(g) *In 1900, when this N. Y. statute had been amended to require auction sale of articles retaken (Laws of 1900, ch. 762) it had been long settled that the U. S. Statutes for recording instruments of title of vessels controlled, and superseded all State legislation on this subject.*

This supremacy of Federal law had been laid down in an opinion of Nelson, J., in *Sinnott v. Davenport*, 22 Howard 227, and later in *Aldrich v. Aetna Ins. Co.*, 8 Wall. 491.

Yet in that period certain State courts still held a view that State statutes might enforce the filing of instruments within some State office (*The Parker Mills v. Jacot*, 8 Bosworth 161; *Aetna Co. v. Aldrich*, 26 N. Y. 92, reversed in 8 Wall. 491), although other States had held that this Federal statute was controlling. *Wood v. Stockwell*, 55 Maine 76; *Shaw v. McCandless*, 36 Miss. 296; *Mitchell v. Steelman*, 8 Cal. 363.

Before these later decisions, Prof. Parsons in 1879 declared:

"Waiving the question of the constitutionality of this statute of 1850, which we have already considered, we are of opinion that the United States statute controls the state statute, so far that record under this latter would have no effect or legal notice of the transfer. At least if it be constitutional, we do not see how its requirements can be superseded or supplied by those of a state law." 1 *Parsons on Shipping and Admiralty*, page 61.

In a standard treatise of the year 1898 "*The Commerce Clause of the Federal Constitution*," by Prentiss and Eagan—appeared this accurate summary at page 102:

"*Instruments affecting title to vessels.*—Congress has also provided for the registry, enrollment, and licensing of vessels, and the recording of instruments affecting their title. These regulations apply to all vessels of the classes described in the acts navigating public waters of the United States, although employed solely within a State. Under the early decision, it was held that a State might, notwithstanding the Act of Congress, require conveyances to be recorded with a State officer in order to give constructive notice to third parties, but later decisions have established that if a conveyance affecting the title to a vessel is recorded as required by the Act of Congress, no further conditions of notice can be required by a state, either by recording or change of possession, and that recording under a State law does not give constructive notice."

Authorities supporting this final proposition are:

- Aldrich v. Aetna Ins. Co.*, 8 Wall. 491;
Folger v. Weber, 16 Hun (23 N. Y. Sup. Ct.) 512;
Perkins v. Emerson, 59 Maine 319;
Mitchell v. Steelman, 8 Cal. 363;

(h) *Statutes similar in their general effect to Section 65 of the New York Personal Property Law have been passed*

*in other states, but have never been applied to documented vessels.**

In the *Oceana*, 233 Fed. 139, a registered vessel, had been sold in Brooklyn with a contract, that the vendor should keep the title until full performance by the buyer.

This contract was filed in the office of the Register of Kings County in supposed compliance with this State law. When the *Oceana* was sold, and liens were filed against the proceeds, in the U. S. District Court, the Court said, at page 146:

"There was, of course, no constructive notice by virtue of the filing of the contract of conditional sale in conformity with the state statute. The Act of June 23rd, 1910, expressly supersedes state statutes conferring liens on vessels; and under Revised Statutes, Sec. 4192, Comp. St. 1913, Sec. 7778, there is no constructive notice to anybody, unless the bill of sale or conveyance is recorded in the office of the collector of the customs, where such vessel is registered or enrolled."

* Conditional contracts of sale in many States must be recorded or filed to hold title as against third parties.

The States which require such recording or filing of these contracts are as follows: Alabama, Arizona, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Vermont, Virginia, Washington, West Virginia, Wisconsin and Wyoming, thirty-six in all.

The provisions of these state statutes with respect of recording and filing vary greatly. In some states conditional sale contracts, where the contracts are for less than \$100, are not required to be filed. Many states also have special provisions with respect to the filing of contracts for the conditional sale of railroad equipment.

This is a determination that filing in a county office a contract for the conditional sale of a registered vessel is nugatory and ineffective as to third persons. It wholly fails as constructive notice.

Thus this State legislation evidently was only for such chattels as may legally pass without writing, and thus possibly deceive one dealing on the faith of the supposed ownership. But secret titles have never been a feature of vessel property. There cannot be secret ownership of vessels as to third persons. The several owners, and the encumbrances, are spread upon the Custom House records, and so are constructively known to all.

Furthermore, the maritime law, personifying the vessel, provides liens *in rem* in favor of most creditors, whether of contract or tort, against the vessel itself, regardless of mortgages or like incumbrances, the *J. G. Stevens*, 170 U. S. 113; also by a Federal statute for needed repairs and supplies. Stat. June 23, 1910, 36 Stat. at Large, page 604.

Therefore for documented vessels, no conditional sales statutes would ever be needed.

In connection with this question of the applicability of the Personal Property Law of the State to the conditional sale of vessels, it is important to remember that the object of the conditional sales law is that there may be a public record of the ownership of the chattel which is the subject matter of the conditional sale.

That was the purpose of all conditional sales legislation throughout all the States.

The Act of Congress of July 29, 1850, providing for the recording of conveyances of vessels, United States Revised Statutes, 4192, provides a place of public record

of the ownership of a vessel of the United States, for in order to be a vessel of the United States a vessel must have its title recorded in the office of the appropriate Collector of Customs.

In the present case, the tug, *Stewart* was a vessel of the United States and its title was recorded in the Custom House at New York City.

Therefore, all the world received constructive notice as to the ownership of the vessel.

There was no reason whatsoever why the State law as to the recording of conditional sales should have been considered applicable to the tug.

Cessante ratione, cessat ipsa lex.

(i) *A sale under the State act would not give a good title to a vessel.*

The auction sale by a vendor, after due notice foreclosing the interest of a defaulting buyer of an ordinary chattel or "article" usually gives a valid title. This is not so as to vessels. As vehicles of commerce every trip or movement subjects the *res* to possible maritime liens in favor of seamen; for supplies furnished (Stat. June 23d, 1910; 36 Stat. 604); and for reparation for torts. The *J. G. Stevens*, 170 U. S. 113. In such case of a defaulting buyer, no doubt there would be outside creditors with liens, all of which would threaten the purchaser's title.

A sale under this State statute cannot extinguish these liens, which remain unaffected against any one indiscreet enough to buy at such an auction. Benedict, Admiralty, §290; The *Sailor Prince*, 2 Ben. 234, Fed. Cases No. 12218.

Even a State Court Receiver in possession cannot sell

except subject to maritime liens which adhere to the *res*, into whose hands she may come. *Moran v. Sturges*, 154 U. S. 256.

Title can only be cleared by admiralty process, and condemnation *in rem*, after due publication. 26 Cyc. 798.

These *results* may be an important guide to the construction of a statute.

Matter of Emerson v. Buck, 230 N. Y. 380, 388.

(j) *A State Legislature is not presumed to invade the field of Congress.*

With these clearly marked limitations on the power of any State, as laid down by the Supreme Court, and by State courts, and declared by textwriters, it would be the height of unreason to impute to the N. Y. Commission of Statutory Revision, and then to the N. Y. Legislature, a purpose, by this Personal Property Law, thus to invade the province of Congress, and disturb a long settled system of records of ship's titles. Even a legislature is presumed to know its constitutional power, and hence is not presumed to enact illegal measures.

Borden v. Enterprise Co., 198 Mass. 590.

In the words of Holmes, J.

"It is not lightly to be supposed, that a legislature is less faithful to its obligations than a court."

Gray v. Taylor, 227 U. S. 51, 56.

Here, however, this is more than a general presumption.

By the accurate report of the Commissioners of New York Statutory Revision, submitted to the very legislative

body which passed the act, the legislators had before them a clear exposition of the limits of its powers regarding vessels.

L A S T P O I N T

THE MOTION TO DISMISS OR AFFIRM SHOULD BE DENIED AND THE CASE SHOULD NOT BE PLACED ON THE SUMMARY DOCKET FOR THE REASON THAT THE ISSUES INVOLVED ARE TOO IMPORTANT TO BE DEALT WITH ON THAT DOCKET.

Respectfully submitted,

HARRINGTON PUTNAM,
JOHN M. WOOLSEY,
L. DE GROVE POTTER,
Attorneys for James Stewart & Company,
Plaintiff-in>Error,
27 William Street,
New York, N. Y.

New York, N. Y., October 2nd, 1926.





Office Supreme Court, U.
S.
FILED
SEP 28 1926
W.M. R. STANBURY
CLERK

Supreme Court of the United States.

OCTOBER TERM, 1926.

No. 290.

JAMES STEWART & COMPANY,

Plaintiff-in-Error,

against

DOMINICK RIVARA,

Defendant-in-Error.

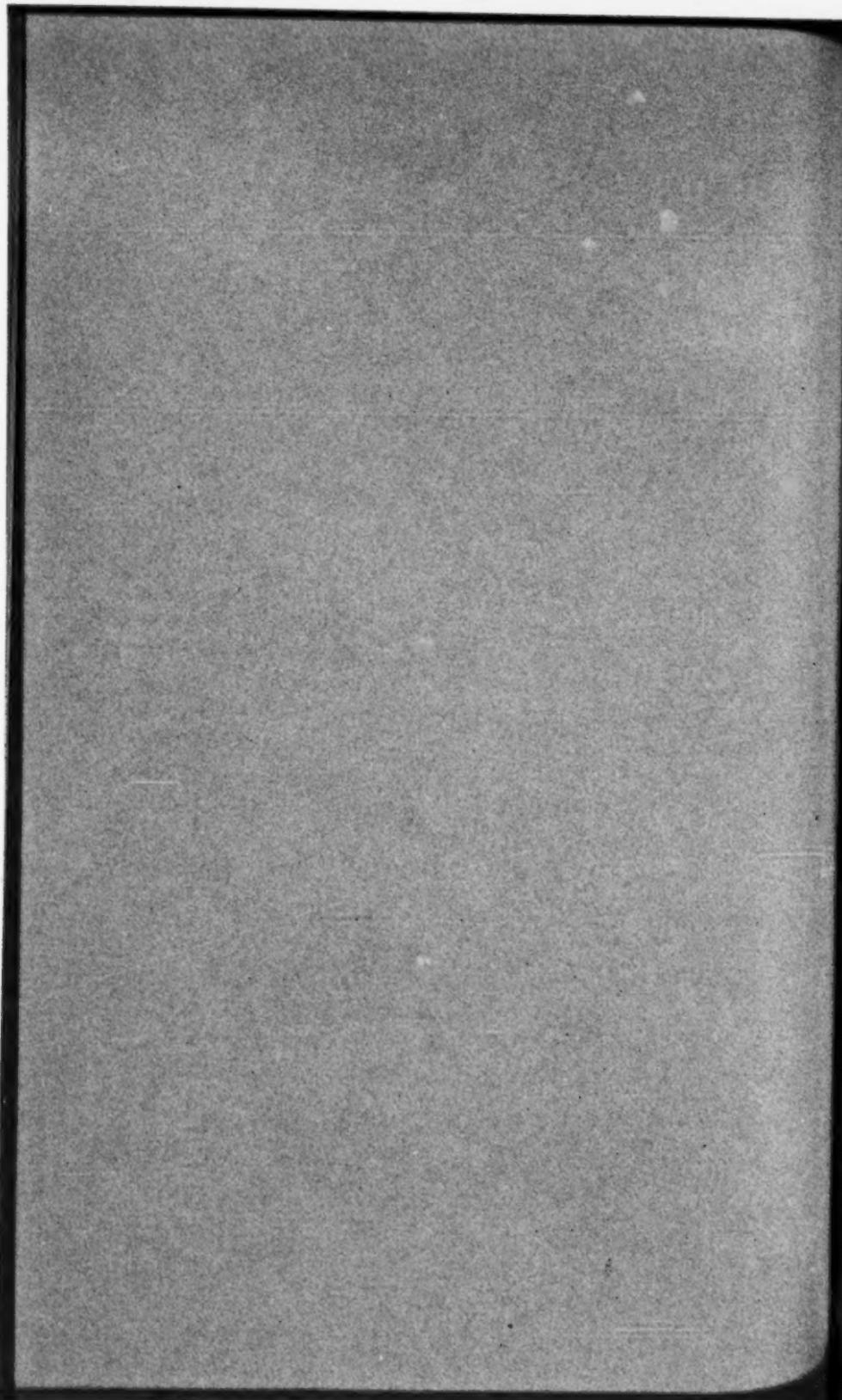
BRIEF FOR DEFENDANT-IN-ERROR ON MOTION TO DISMISS THE WRIT OR
TO AFFIRM JUDGMENT OR FOR ALTERNATE RELIEF UNDER
RULE 6, AND NOTICE OF MOTION.

PIERRE M. BROWN,

Attorney for Defendant-in-Error,

No. 44 Beaver Street,

New York, N. Y.



Supreme Court of the United States.

OCTOBER TERM, 1926.

JAMES STEWART & COMPANY,
Plaintiff-In-Error,

AGAINST

DOMINICK RIVARA,
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No. 290.

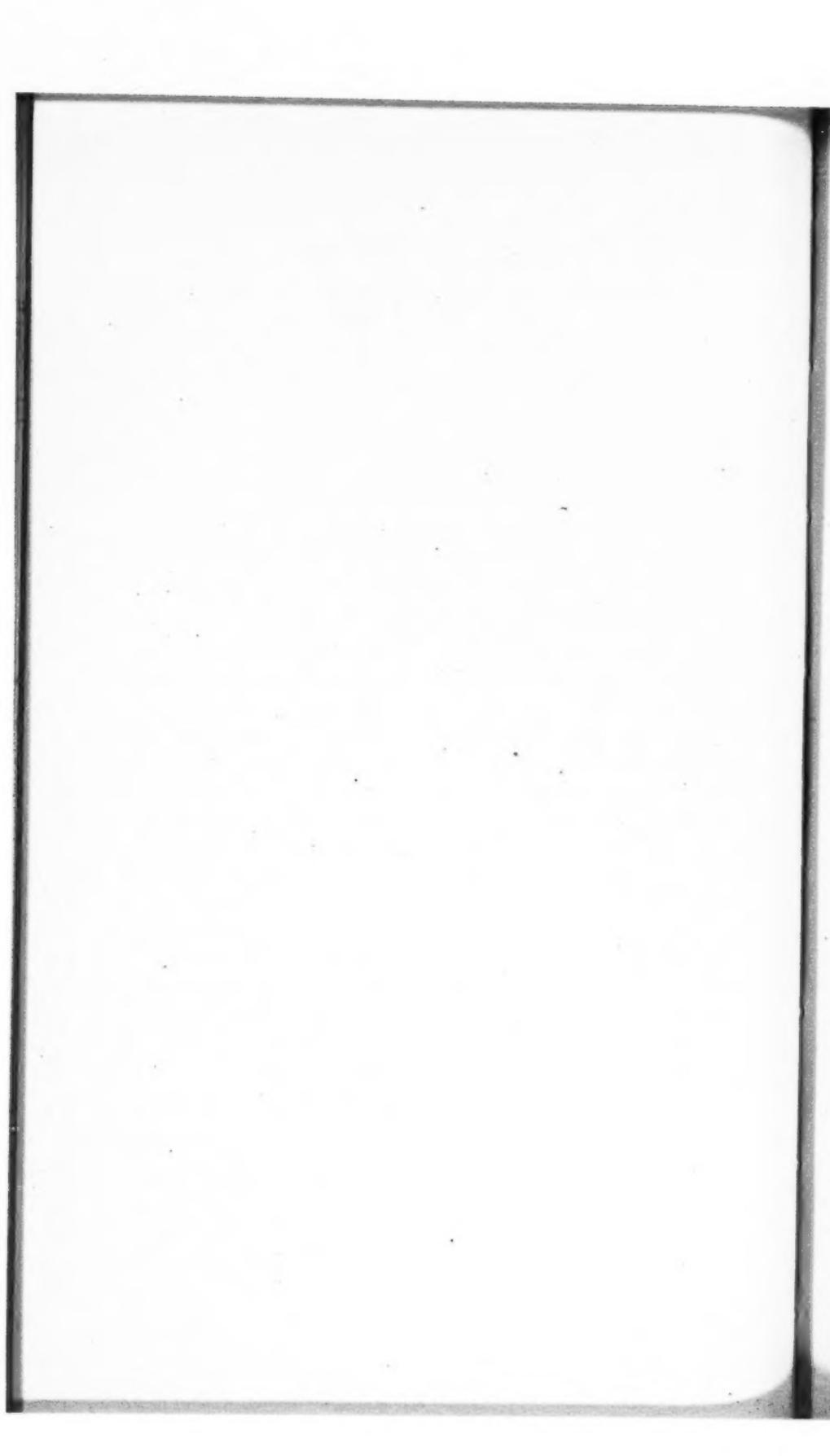
SIRS:

PLEASE TAKE NOTICE that upon the Record on file herein and the accompanying brief, I shall move this Court pursuant to Rule 6 of the Rules of this Court on October 4th, 1926, at the opening of Court on that day to dismiss the Writ of Error, or to affirm, or in the alternative to place the cause on the Summary Docket of this Court, on the grounds that the questions raised by the Writ and accompanying papers are frivolous and raised for purposes of delay, and so unsubstantial as not to need further argument.

Dated, New York, N. Y.,
September 20, 1926.

PIERRE M. BROWN,
Attorney for Defendant-In-Error,
Office and P. O. Address,
No. 44 Beaver Street,
New York, N. Y.

To: HARRINGTON PUTNAM, Esq., and
JOHN M. WOOLSEY, Esq.,
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No. 27 William Street,
Borough of Manhattan,



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

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AGAINST
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BRIEF FOR DEFENDANT-IN-ERROR ON MOTION TO
DISMISS THE WRIT OR TO AFFIRM JUDGMENT OR
FOR ALTERNATE RELIEF UNDER RULE 6.

As is shown by paragraph "Third" of the petition for the writ of error (page eighty-four of the Record) the sole ground of attack upon the judgment is that the Statute of New York relating to conditional sales are repugnant to the Federal Constitution if sought to be applied to a vessel, although it is owned, registered and found within this State.

The controversy lies solely between the *parties* to the conditional sales contract, and so far as this case is concerned, the statute in question relates only to the rights and liabilities of such parties between themselves.

It is quite safe to say that for over fifty years men of small means have been enabled to buy and put into operation barges and tugs under this Statute which prescribes the method by which the vessel may be retaken in case of default.

Congress not having legislated upon this subject, the fact that this State Statute is not in violation of any Federal Law is so completely demonstrated in the opinion of Judge Cardozo of the New York Court of Appeals (page 86 Record) that we respectfully beg to submit this matter upon that opinion.

Respectfully submitted,

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